165

(1)

Supreme Court, U.S.
FILED

No. 10-29 JUN 30 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

HAKEEM CURRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE S. LUSTBERG, ESQ.
Counsel of Record

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
llustberg@gibbonslaw.com

ANDREW B. SMITH, ESQ.
SMITH + SCHWARTZSTEIN LLC
18 MacCulloch Ave.
Morristown, New Jersey 07960
(973) 206-1725

Attorneys for Petitioner Hakeem Curry

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether defendants may, under the Fourth Amendment to the Constitution of the United States and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") challenge the admissibility of evidence derived from improperly sealed wiretaps and whether defendants bear the burden of producing specific evidence of the taint to evidence derived from admittedly unlawful wiretapping in advance of a taint hearing.

Whether under the Sixth Amendment to the Constitution of the United States, a defendant should be allowed a reasonable continuance to obtain counsel of his choice where there was indisputably good cause to remove his previous attorney.

Whether the prosecution should, as has become pervasive practice, be permitted to adduce highly prejudicial, detailed and lengthy testimony about years of uncharged crimes in drug conspiracy cases based solely upon an abstract recitation of the language of Federal Rule of Evidence 404(b).

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Hakeem Curry
2. United States of America

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	v
CITATIONS OF OPINIONS AND ORDERS	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	12
A. This Court's Intervention Is Required Because The Third Circuit's Holdings Related To The Illegal And Improperly Sealed Wiretaps, That Evidence Derived From Improperly Sealed Wiretaps Was Admissible And That Defendants Have A Burden To Show Taint Prior To A Taint Hearing, Are In Direct Conflict With Other Circuits	15
B. This Court's Intervention Is Necessary To Clarify The Law Surrounding The Scope Of A Court's Discretion To Deny Reasonable Continuances In Order For A Criminal Defendant To Obtain An Attorney Of His Choice Where There Was Good Cause To Remove His Original Counsel	21

TABLE OF CONTENTS – Continued

Page

C. This Court's Intervention Is Necessary To Place Limits On The Pervasive Practice Of Admitting Bad Acts Testimony About Uncharged Crimes In Drug Cases Where The Basis For Such Admission Is The Parroting Of The Abstract Exceptions Articulated In Federal Rule of Evidence 404(b) 31

CONCLUSION 38

APPENDIX

Opinion of the Court of Appeals for the Third Circuit ..... App. 1

Judgment of the Court of Appeals for the Third Circuit ..... App. 8

Order of the Court of Appeals for the Third Circuit Denying Motions for Leave to File Over-Length Reply Brief and for Leave to Expand the Record ..... App. 10

Judgment of the United States District Court for the District of New Jersey ..... App. 12

Statement of Reasons for Granting Defense Counsel Nuzzi's Motion to Withdraw on Grounds of Actual Conflict of Interest and Denying Motion for Reconsideration ..... App. 17

Opinion and Order on Motions *In Limine* ..... App. 56

Order of the Court of Appeals for the Third Circuit Denying Motion for Rehearing ..... App. 67

TABLE OF AUTHORITIES

Page

CASES

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 29

Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978) 24

Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962) 32

Huddleston v. United States, 485 U.S. 681 (1988) 33

In re United States, 10 F.3d 931 (2d Cir. 1993) 20

McKee v. Harris, 649 F.2d 927 (2d Cir. 1981) 25

McMahon v. Fulcomer, 821 F.2d 934 (3d Cir. 1987) 25, 28

Morris v. Slappy, 461 U.S. 1 (1983) 29, 30

Nardone v. United States, 308 U.S. 338 (1939) ... 16, 20

Old Chief v. United States, 519 U.S. 172 (1997) 31

Powell v. Alabama, 287 U.S. 45 (1932) 22

United States v. Apple, 915 F.2d 899 (4th Cir. 1990) 19

United States v. Baskerville, 339 Fed. Appx. 176 (3d Cir. 2009) 1

United States v. Bowe, 221 F.3d 1183 (11th Cir. 2000) 23, 26

United States v. Brown, 744 F.2d 905 (2d Cir. 1984) 25

TABLE OF AUTHORITIES – Continued

Page

United States v. Byrum, 567 F.3d 1255 (10th Cir. 2009) 25

United States v. Conner, 583 F.3d 1011 (7th Cir. 2009) 36

United States v. Crawford, 60 Fed. Appx. 520 (6th Cir. 2003) 23

United States v. Crouch, 528 F.2d 625 (7th Cir. 1976) 18, 20

United States v. Curtis, 280 F.3d 798 (7th Cir. 2002) 32

United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976) 17

United States v. DiZenzo, 500 F.2d 263 (4th Cir. 1974) 34

United States v. Donlan, 825 F.2d 653 (2d Cir. 1987) 18

United States v. Ellens, 43 Fed. Appx. 746 (6th Cir. 2002) 26

United States v. Fischbach & Moore, Inc., 750 F.2d 1183 (3d Cir. 1984) 26

United States v. Fury, 554 F.2d 522 (2d Cir. 1977) 18

United States v. Giordano, 469 F.2d 522 (4th Cir. 1972) 21

United States v. Goldberg, 67 F.3d 1092 (3d Cir. 1995) 25, 28

TABLE OF AUTHORITIES - Continued

Page

United States v. Gomez, 67 F.3d 1515 (10th Cir. 1995) 17

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 22, 23, 29

United States v. Harris, 661 F.2d 138 (10th Cir. 1981) 34

United States v. Johnson, 439 F.3d 884 (8th Cir. 2006) 31, 34

United States v. Kandik, 633 F.2d 1334 (9th Cir. 1980) 20

United States v. Kikumura, 947 F.2d 72 (3d Cir. 1991) 23, 27, 28

United States v. Koblitz, 803 F.2d 1523 (11th Cir. 1986) 27

United States v. Laura, 607 F.2d 52 (3d Cir. 1979) 22

United States v. MacCullum, 584 F.3d 471 (2d Cir. 2009) 33, 35

United States v. Maxwell, 25 F.3d 1389 (8th Cir. 1994) 18

United States v. Morena, 547 F.3d 191 (3d Cir. 2008) 31

United States v. Nerber, 222 F.3d 597 (9th Cir. 2000) 19

United States v. Oaks, 606 F.3d 530 (8th Cir. 2010) 33, 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Ojeda Rios, 495 U.S. 257 (1990) 16

United States v. Olfano, 503 F.3d 240 (3d Cir. 2007) 27

United States v. Peppers, 302 F.3d 120 (3d Cir. 2002) 24, 28

United States v. Ragusa, 664 F.2d 696 (8th Cir. 1981) 26

United States v. Reyes-Bosque, 596 F.3d 1017 (9th Cir. 2010) 25

United States v. Sampson, 980 F.2d 883 (3d Cir. 1992) 32

United States v. Seale, 461 F.2d 345 (7th Cir. 1972) 16, 20

United States v. Shepherd, 102 F.3d 558 (D.C. Cir. 1996) 26

United States v. Thomas, 593 F.3d 752 (8th Cir. 2010) 35

United States v. Torres, 793 F.2d 436 (1st Cir. 1986) 25

United States v. Trogdon, 575 F.3d 762 (8th Cir. 2009) 35, 37

United States v. Vilar, 530 F. Supp. 2d 616 (S.D.N.Y. 2008) 16, 20

United States v. Ward, 211 F.3d 356 (7th Cir. 2000) 37

TABLE OF AUTHORITIES – Continued

Page

United States v. Washington, 341 F.2d 277 (3d Cir. 1965) 28

United States v. Weigelt, 825 F.2d 412 (6th Cir. 1987) 24

United States v. Welty, 674 F.2d 185 (3d Cir. 1982) 23, 24, 25, 28

United States v. Woodward, 291 F.3d 95 (1st Cir. 2002) 25

United States v. Young, 482 F.2d 993 (5th Cir. 1973) 25

Wheat v. United States, 486 U.S. 153 (1988) 22

Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985) 25

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 2

U.S. Const. amend. VI 2

STATUTES

18 U.S.C. § 2515 15

18 U.S.C. § 2518 6

18 U.S.C. § 2518(8)(a) 3, 16, 17

18 U.S.C. §§ 2510-2520 ..... 3, 15

18 U.S.C. § 2517 4

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Ev. 404 31

Fed. R. Ev. 404(a) 31

Fed. R. Ev. 404(b) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Hakeem Curry respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 30, 2009 and the Order Denying Appellants Petition for Rehearing entered on April 1, 2010. App. 8; App. 67.

CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Third Circuit is reported at *United States v. Baskerville*, 339 Fed. Appx. 176 (3d Cir. 2009). App. 1. The district court's order and opinion denying Petitioner's request for a continuance to procure counsel of choice and the district court's opinion and order allowing the government to introduce testimony of pre-indictment bad acts are included in the appendix. App. 17; App. 56. While Petitioner repeatedly asked for a hearing with respect to whether evidence derived from illegal and improperly sealed wiretaps should be suppressed, the district court ignored the request, and no taint hearing was ever held.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 2009 and the Order Denying Appellants Petition for Rehearing was entered on

April 1, 2010. App. 8; App. 67. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2520 provides in relevant part:

> [18 U.S.C. § 2515] Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 U.S.C. §§ 2510 et seq.] . . .
>
> [18 U.S.C. § 2518(8)(a)] The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 USCS §§2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge

> and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter [18 USCS § 2517] for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT OF THE CASE

1. In early 2003, drug enforcement officials commenced an investigation into drug related activity in Newark, New Jersey. Drug Enforcement Administration ("DEA") Agent Gregory Hilton led the DEA Task Force investigation, aided by Detective (later Sergeant) George Snowden of the Newark Police Department. Initially, Petitioner, the owner of a clothing business and the father of three, residing in Newark, was not the target of the investigation; according to Detective Snowden, the DEA Task Force was not "able to pick him up until *after* we started going up on phones" on September 12, 2003 (emphasis added).

2. In conducting its investigation, the DEA Task Force deployed wiretaps of several individual cell

phones, including Petitioner's, from September 12, 2003 through March 5, 2004.

3. On March 4, 2004, Lachoy Walker was arrested by agents of the DEA Task Force and charged with possession of one hundred "bricks" of heroin. The next day, wearing a body wire, Walker carried the same one hundred bricks of heroin into a car driven by Petitioner. Although Petitioner vigorously objected to Walker's bringing the drugs into his car, and in fact denounced ownership of the drugs and ordered Walker and the drugs out of his car, a team of waiting agents took them both into custody. No drugs or any other contraband was at any time found on Petitioner, or in any car or residence he owned or rented.

4. Ultimately, the government charged Petitioner and eleven co-defendants with conspiracy to distribute large quantities of heroin and cocaine in Newark, New Jersey. The original indictment included two counts, charging conspiracy to distribute drugs between September 12, 2003 and March 5, 2004, the period of the wiretaps. But three superseding indictments followed, as a result of which Petitioner's trial was repeatedly postponed, for a total of well over a year. Ten of the co-defendants entered pleas of guilty, and Petitioner stood trial with only one co-defendant, Rakim Baskerville. None of the co-defendants testified against Petitioner at trial.

5. Petitioner hired Vincent J. Nuzzi, Esq. to be his trial attorney. However, Mr. Nuzzi operated a

small firm, which was not equipped to handle the extensive motion practice required in light of the government's multiple superseding indictments and the other issues raised by the scope and nature of the evidence in the case. Accordingly, Petitioner retained the firm of Walder, Hayden & Brogan, P.C. (by James A. Plaisted, Esq.) to represent him in connection with this motion practice. Nuzzi, however, remained lead and trial counsel. Indeed, during pretrial proceedings, the trial judge specifically informed Nuzzi and Plaisted that only "[o]ne of you is going to have to be counsel." There was no question that such counsel was to be Nuzzi, while Plaisted and his firm would handle motions and other legal matters, a common division of labor in federal criminal cases.

6. Before trial, the prosecution acknowledged multiple violations of Title III, 18 U.S.C. § 2518, pursuant to which wiretaps had been placed on Petitioner's cell phones from September 12, 2003 until March 5, 2004. Specifically, it acknowledged that taping had occurred outside the time permitted by at least one wiretap order, and that all the wiretaps from October 10, 2003 through February 17, 2004, which represented tens of thousands of calls, were "improperly sealed"[1] under Title III.

7. Petitioner moved to suppress the illegal and improperly sealed tapes and fruits thereof; the trial

---

[1] Petitioner uses the term improperly sealed, but at least some tapes were not sealed at all.

judge ordered that the illegal and improperly sealed wiretaps could not themselves be offered as evidence, but refused, without explanation, to hold a hearing to determine if any other evidence at trial was derived from the tens of thousands of illegal and improperly sealed wiretaps.

8. Trial was scheduled to begin in May of 2006. However, in April of 2006, a conflict of interest with Petitioner's trial counsel, Nuzzi, was discovered, and it was determined that the conflict could not be cured or waived. App. 22. On May 8, 2006, the prosecutor informed the district court of the conflict. App. 18.

9. Several days later, on May 11, 2006, the district court ordered all counsel to appear, placing Nuzzi, Plaisted, Plaisted's associate, Petitioner and the lead prosecutor, John Gay, under oath. App. 22. After the district court determined that Nuzzi could not remain as Petitioner's counsel, Petitioner asked the Court, "how can I go to trial? I've got no lawyer." The Court replied, "you've got Mr. Plaisted as your lawyer at trial," and appointed Plaisted to represent Petitioner.

10. Petitioner vigorously objected, and asked the Court for time to retain a different attorney for trial:

> THE DEFENDANT: Your Honor, I need to have a chance to talk to my family to hire a trial attorney. I never talked to – with Mr. Plaisted, with him trying no case or not. I want you – to ask that you grant me enough

> time, two weeks of time to find out, can I get a defense attorney, can my family hire a defense attorney to try my case. . . . Judge, I would like for you to consider that I have a defense trial attorney that I'm comfortable with, I'm not comfortable with Mr. Plaisted trying my case, I'm not comfortable with it, Judge.
>
> THE COURT: We have a trial that starts Monday.

11. Plaisted himself told the Court that Petitioner did not trust him and that he was unprepared to try the case, explaining that his firm had only been hired for motion practice and appeals.[2] He further stated that he had not even expected to attend the entire trial, and said, "I have not been addressing this case in the fashion a trial lawyer would at all." He would later reiterate this objection, stating that he was "not prepared to confront the prosecutor's evidence." The district court denied all requests for a continuance, and jury selection commenced on May 15, 2006; the trial itself began the following Monday, May 22, 2006.

12. At trial, the prosecution's case rested largely on the testimony of Lachoy Walker, who testified in exchange for a more lenient sentence. In fact, the

---

[2] In fact, Mr. Plaisted was never paid for the time he spent at trial, as it was not part of the retention agreement he had with Petitioner, and the district court refused to order CJA payment.

prosecution introduced only a tiny percentage of the wiretapped conversations, which were cryptic, at best.

13. At the beginning of the trial, over defense objection, the trial court permitted the prosecution to lead Lachoy Walker through an account that described his own drug-dealing career and purported to describe that of Petitioner, beginning in 1993 when Petitioner was 17 years old. The detailed account took Walker and Petitioner through a number of "bad acts," including several different schemes, some involving heroin and some involving cocaine, in several locations, with several different suppliers and distribution mechanisms. Walker described seven years of claimed collaboration with Petitioner, and testified for a day and a half, covering well over 200 pages of transcripts, before his account reached 2000, the earliest year covered by the final indictment. None of this evidence was corroborated by the prosecution. Nor did the prosecution articulate a theory of relevance for this pre-indictment evidence, but rather, merely restated the text of Federal Rule of Evidence 404(b), supplemented by other, equally abstract contentions that amounted to an appeal to propensity. App. 57. The district court's instructions essentially repeated the same list.

14. After a lengthy trial, on July 24, 2006, more than two years after his arrest, Petitioner was convicted of conspiracy to distribute cocaine and heroin, distribution and possession of heroin, and three counts of money laundering. App. 12-13.

15. Petitioner moved for a new trial and judgment of acquittal which was denied on January 31, 2007. On February 7, 2007, the Court denied Petitioner's motion for a downward departure and a variance, and imposed a sentence of life plus sixty years in prison, plus massive fines. App. 14-16.

16. Petitioner timely filed a notice of appeal on February 14, 2007, and filed his appellate brief on August 8, 2007. Co-defendant Rakim Baskerville's appeal was consolidated with Petitioner's. When, after almost a year, Mr. Baskerville still had not filed his appellate brief, however, Petitioner moved to sever his appeal from that of Mr. Baskerville, but that motion was denied by the Court of Appeals.

17. On December 2, 2008, the prosecution filed its opposition to Petitioner's appeal. In its lengthy brief, totaling 133 pages, the prosecution raised several arguments for the first time, including that Petitioner was not entitled to a suppression hearing because that Petitioner had not proven that he was a party to any of the illegally wiretapped conversations and therefore lacked standing to challenge them, and because he had not listed any specific evidence derived from the illegal and improperly sealed wiretaps as to which he sought suppression.[3]

18. On February 27, 2009, Petitioner filed his reply brief. Although Petitioner disagreed with the

---

[3] That Petitioner had not listed such evidence below is very much in dispute and the district court never ruled on this issue.

prosecution's assertion that he was not entitled to a suppression hearing because he allegedly failed to list specific evidence as to which he sought suppression, Petitioner nonetheless used his reply brief to describe the exact evidence to be suppressed, noting that there were many more specific calls which gave rise to suppressible evidence to which he could point if given a full and fair opportunity to do so. Additionally, in the supplemental appendix to his reply brief, Petitioner added transcripts of several illegally wiretapped calls to establish his standing to challenge evidence derived from those calls, in response to the argument first made by the prosecution in its opposition brief. Of necessity, Petitioner moved for leave to file an over-length reply brief and supplemental appendix, as well as to expand the record.

19. The appeal was scheduled for disposition the week of July 13, 2009, but on July 2, 2009, Petitioner was informed that there would be no oral argument, and that his appeal would be considered on the papers; on July 30, 2009, the Court of Appeals affirmed Petitioner's conviction in a brief, unpublished opinion, which addressed two of petitioner's arguments, holding that the district court had not abused its discretion in denying Petitioner a continuance to obtain counsel of his choice and that because Petitioner "failed to identify any evidence as tainted in their briefs," the district court did not err in refusing to hold a taint hearing. App. 1-7. Six days later, on August 5, 2009, the court denied both Petitioner's motion to file an over-length reply brief and to expand the record. App. 10-11.

20. On August 13, 2009 Petitioner filed a motion for panel rehearing and rehearing *en banc*. The motion argued that the reason given for upholding the denial of the taint hearing was the fact that Petitioner failed to identify tainted evidence "in their briefs," when in fact the reply brief, which the Court of Appeals had refused to consider without explanation, did in fact identify, in response to the first such request by the government, the specific evidence to be suppressed.

21. Some eight months later, on April 1, 2010, the Third Circuit denied Petitioner's request for a panel rehearing, and denied Petitioner's request for a rehearing *en banc*. App. 67-69.

REASONS FOR GRANTING THE PETITION

Petitioner was convicted on drug and money laundering charges and sentenced to life plus sixty years in prison after a trial for which he had to wait for two years, only to have it conducted by a defense attorney forced upon him at the last moment, in which evidence was presented that was undoubtedly derived from illegal and improperly sealed wiretaps, and on the strength of the testimony of a single witness, whose credibility was subject to serious attack, but who was allowed to testify at length about alleged prior bad acts that had no connection to the indictment and no corroborating support. Then, after being forced to wait almost two years for his appeal to be heard, the Court of Appeals affirmed that conviction,

based in large part upon Petitioner's failure to brief an issue that was in fact addressed in his reply brief, a brief that the appellate court inexplicably refused to consider because it was over-length, without giving him an opportunity to cure this deficiency, and despite the fact that the prosecution was permitted to file an extremely over-length opposition brief.

More importantly, this case raises three extremely significant legal issues that require this Court's intervention. First, the Third Circuit adhered to the Second Circuit's minority view that the evidence derived from improperly sealed wiretaps was not subject to suppression and held, contrary to decisions of the Fourth, Seventh and Ninth Circuits, that Petitioner was required to (but did not) provide a list of the specific evidence to be suppressed *in advance* of a taint hearing. With respect to this issue, the Court's intervention is necessary to resolve a conflict in the Circuits and to establish a uniform rule with respect to the scope of the protection that the Fourth Amendment and Title III provide from illegal and improperly sealed wiretaps, and specifically whether evidence derived from unsealed wiretaps should be subject to suppression, as well as whether defendants bear the burden of identifying the specific evidence to be suppressed prior to a taint hearing.

Second, the Court of Appeals held, contrary to its own precedent and the precedent of several sister Circuits, that it was not an abuse of discretion to deny Petitioner a continuance in order to obtain new counsel of his choice, where there was good cause to

remove Petitioner's prior chosen counsel. This decision, and others, including some which do not even consider whether good cause exists for the replacement of counsel, have left the jurisprudence to be considered by trial courts and courts of appeals on a daily basis muddled and confused, particularly with respect to the scope of a trial judge's discretion to deny a continuance where "good cause" exists.

Finally, the Court of Appeals affirmed Petitioner's conviction and life sentence, notwithstanding the trial court's decision to allow lengthy testimony regarding seven years of prior alleged and uncorroborated "bad acts" that included schemes, locations, suppliers and distribution mechanisms totally unrelated to the charges in the indictment. This Court's intervention is necessary to review an ever more persistent practice of numerous courts to allow any and all prior bad acts evidence, no matter how extreme the prejudice, based upon conclusory statements of prosecutors parroting the language of Federal Rule of Evidence 404(b), in violation of both the Rule and the Constitutional right to a fair trial.

A. This Court's Intervention Is Required Because The Third Circuit's Holdings Related To The Illegal And Improperly Sealed Wiretaps, That Evidence Derived From Improperly Sealed Wiretaps Was Admissible And That Defendants Have A Burden To Show Taint Prior To A Taint Hearing, Are In Direct Conflict With Other Circuits

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and the Fourth Amendment to the Constitution, have resulted in tight regulation of the use of wiretaps. Thus, 18 U.S.C. §§ 2510 *et seq.* outlines the procedures that law enforcement officials must employ when taking the extraordinary step of utilizing wiretaps against Americans. Thus, for example, Title III mandates that any wiretap performed in violation of the statute, and any evidence derived from such wiretap cannot be used in a court of law. *See* 18 U.S.C. § 2515. The statute states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS §§ 2510 et seq.].

2. Further, courts have long recognized that where there are issues of taint with regard to a wiretap, a taint hearing must be held. *See Nardone v. United States*, 308 U.S. 338, 341 (1939) (once it is established that wire-tapping was unlawfully employed, "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree"); *United States v. Seale*, 461 F.2d 345, 365 (7th Cir. 1972) (holding that a taint hearing was necessary and "sworn testimony, subject to cross-examination, of relevant Government witnesses must be submitted on remand to show lack of taint"); *United States v. Vilar*, 530 F. Supp. 2d 616, 641 (S.D.N.Y. 2008) ("The overwhelming weight of authority favors the view that, given a 'primary illegality,' [citation omitted] the defendant must be given some opportunity to resolve issues of taint – either during a 'full evidentiary hearing' or at a trial on the merits.").

3. Title III, 18 U.S.C. § 2518(8)(a), also outlines the sealing procedures that must be followed after a wiretap is recorded. The purpose of these requirements is to prevent recorded wiretapped conversations from being altered. *See* 18 U.S.C. § 2518(8)(a) ("The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations."); *United States v. Ojeda Rios*, 495 U.S. 257, 263 (1990) ("The primary thrust of § 2518(8)(a), and a congressional purpose embodied in

Title III in general, is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." (internal citations omitted)); *United States v. DiMuro*, 540 F.2d 503, n.15 (1st Cir. 1976) ("The primary purpose of § 2518(8)(a) is to ensure accuracy of recordings at the time of monitoring and to require sealing to deter alterations."). The statute further provides that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication *or evidence derived therefrom* under subsection (3) of section 2517." (emphasis added).

4. Despite this apparently clear statutory directive, the various courts of appeals have approached the issue of the admissibility of evidence derived from improperly sealed wiretaps differently. Thus, for example, the Seventh, Eighth, and Tenth Circuits have explicitly acknowledged that the "plain language" of the statute controls, and that the remedy for failure to properly seal under 18 U.S.C. § 2518(8)(a) is suppression of both the recording itself and any evidence derived therefrom. *See United States v. Gomez*, 67 F.3d 1515, 1523 (10th Cir. 1995) ("By its clear language, Section 2518(8)(a) requires, as a prerequisite to the admissibility of a recording, that one of two criteria be satisfied: either the recording must have been properly placed under seal, or the government must provide a 'satisfactory explanation' for its failure to comply with the sealing requirement.

[citation omitted] The sanction for the government's failure to comply with the statute, by the plain language of the statute itself, is suppression of the recording and evidence derived therefrom."); *United States v. Maxwell*, 25 F.3d 1389, 1393-94 (8th Cir. 1994) ("If the recordings are not sealed immediately and the government cannot provide a satisfactory explanation for the delay, the contents of the recordings and all of the evidence derived therefrom must be suppressed."); *United States v. Crouch*, 528 F.2d 625 (7th Cir. 1976) (holding that violations of 18 U.S.C. § 2518(8)(a) should be subject to taint hearings).

5. On the other hand, the Second Circuit, and the Third Circuit in this case, have held that evidence derived from wiretaps improperly sealed under Title III is admissible. *See United States v. Donlan*, 825 F.2d 653 (2d Cir. 1987) (upholding the admission of evidence obtained in a stop and search of a car, where the stop and search had been based upon the contents of improperly sealed wiretapped conversations); *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977) (holding that the "tapes, even with the fourteen-day unexplained delay in sealing, provide a proper basis for a finding of probable cause to support the issuance of the Fury wiretap order").

6. Here, the Third Circuit adopted the Second Circuit's position, that evidence derived from improperly sealed wiretaps is not subject to suppression. While the court's brief opinion did not expressly analyze the issue, its import is clear:

suppression of the fruits of improperly sealed tape recordings is permitted, and the defense is not even allowed a taint hearing to ascertain what that evidence is. App. 5-7.

7. This Court's intervention is necessary to resolve the direct conflict among the Circuits on this important issue. Without such intervention, some Circuits will allow evidence derived from improperly sealed wiretaps to be admitted, and some will not, with all of the resulting consequences for the Constitutional and statutory rights that inhere in this particularly "intrusive investigative technique." *See United States v. Nerber*, 222 F.3d 597, 605 (9th Cir. 2000).

8. Additionally, and more specifically, the holding of the Court of Appeals that a defendant has the initial burden of identifying specific evidence that he wants suppressed in advance of a taint hearing is also in direct conflict with the law in several other Circuits, including the Fourth, Seventh and Ninth Circuits. App. 5-7.

9. Thus, in *United States v. Apple*, 915 F.2d 899, 906 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit stated, "*At* the taint hearing, the claimant has the initial burden of coming forward with specific evidence demonstrating taint." (emphasis added). The court in *Apple* held a taint hearing even though the defendant did not identify any specific evidence to be suppressed in advance of the taint hearing. *Id.* at 902. In the Fourth

Circuit, then, specific evidence is required *at*, and not before, the taint hearing.

10. Similarly, in *United States v. Crouch*, 528 F.2d 625, 629 (7th Cir. 1976), the Seventh Circuit held that "it must not be impossible for a defendant to carry his burden of demonstrating taint *at* the taint hearing." (emphasis added). Again, it is clear from that decision that a defendant's burden to produce specific evidence comes *at*, and not before, a taint hearing.

11. Indeed, to require that specific evidence be identified before a taint hearing is held is particularly difficult – and indeed, entirely impractical, if not impossible – in cases, like this one, in which there are so many admittedly illegal and improperly sealed wiretaps. As the Court of Appeals for the Ninth Circuit recognized, where there is a need "to sift through a large volume of complex factual material, which was itself the fruit of an illegal wiretap search, to determine the existence of taint," as is the case here, a taint hearing simply must occur. *United States v. Kandik*, 633 F.2d 1334, 1336 (9th Cir. 1980). As such, it is clear that where, as here, the illegality has been established and there is a large volume of material, a taint hearing must be ordered. *See id.*; *see also Nardone*, 308 U.S. at 341; *Seale*, 461 F.2d at 365; *Vilar*, 530 F. Supp. 2d at 641.

12. "Title III contains a number of provisions designed to tightly control the use of [wiretaps] and to safeguard the privacy interests of those subjected to a wiretap.". *In re United States*, 10 F.3d 931, 934 (2d

Cir. 1993); *see also United States v. Giordano*, 469 F.2d 522, 528 (4th Cir. 1972) ("Could the congressional purpose to tighten the law and rigidly confine authorizations to seek wiretaps be expressed more plainly? The statutory terms evidence a firm intention to strengthen and not to weaken the expressed restrictions."). Such tight control is undermined, and citizens' constitutional and statutory rights are accordingly threatened, by decisions, like the one below, allowing the introduction of evidence derived from illegal and improperly sealed wiretaps, without even a hearing to determine what evidence is tainted. App. 5-7. This Court should grant certiorari in order to resolve the existing conflicts between the courts as to the admissibility of evidence derived from improperly sealed wiretaps and the circumstances under which taint hearings may be denied.

B. This Court's Intervention Is Necessary To Clarify The Law Surrounding The Scope Of A Court's Discretion To Deny Reasonable Continuances In Order For A Criminal Defendant To Obtain An Attorney Of His Choice Where There Was Good Cause To Remove His Original Counsel

1. The Sixth Amendment to the Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." Sixth Amendment to the United States Constitution. It is well-established that this right to counsel includes the right to counsel of one's own choice, a right that,

while not absolute, should be denied only in the rarest of instances. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) ("an element of [the Sixth Amendment right to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him"); *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment"); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (choice of counsel, which is the "most important" choice a defendant makes, is a fundamental right under the Sixth Amendment of the United States Constitution, which "affect[s] other constitutional rights").

2. In practice, the application of this right has been problematic. For example, the way in which the right is effectuated appears to be different where the defendant seeking counsel of choice is indigent, as opposed to where, as here, a defendant can afford his or her own attorney. *See, e.g., Gonzalez-Lopez*, 548 U.S. at 151 ("the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"). Moreover, courts often confuse questions of the right to counsel of one's choice with the right to the effective assistance of counsel, especially where a defendant claims that an attorney who is foisted upon him has not provided him the

competent assistance to which he is constitutionally entitled. *See, e.g., United States v. Bowe*, 221 F.3d 1183, 1190 (11th Cir. 2000); *United States v. Kikumura*, 947 F.2d 72, 79 (3d Cir. 1991); *see also Gonzalez-Lopez*, 548 U.S. at 146-48. Finally, the Circuits have long disagreed over such issues as when the denial of counsel of choice amounts to reversible error, and how much of an inquiry is required when determining whether a defendant's rejection of counsel was proper. *Compare United States v. Welty*, 674 F.2d 185, 190 (3d Cir. 1982) (requiring a hearing before requiring a defendant to proceed with unwanted counsel) *with United States v. Crawford*, 60 Fed. Appx. 520 (6th Cir. 2003) (declining to require a hearing before requiring a defendant to proceed with unwanted counsel).

3. Issues of the right to counsel of one's choice often arise when defendants seek trial continuances in order to obtain such counsel. Courts generally have wide discretion in ordering continuances, and their decisions will generally not be overturned where they engage in an appropriate analysis balancing the defendant's right to counsel of choice with the court's need for effective administration of justice. *See Bowe*, 221 F.3d at 1190 (listing six factors for courts to consider in balancing the defendant's right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice); *Kikumura*, 947 F.2d at 79 (stating that "[w]hile the Sixth Amendment affords some protection to the defendant's choice of counsel, when that choice comes into conflict with a trial judge's

discretionary power to deny a continuance, the court will apply a balancing test to determine if the trial judge acted fairly and reasonably . . . [and a] trial court's decision to deny a continuance will only be reversed if an abuse of discretion is shown"); *United States v. Weigelt*, 825 F.2d 412 (6th Cir. 1987) (noting that a motion by a criminal defendant for a continuance of the trial until his retained counsel could be present is directed to the sound discretion of the trial court); *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978) (stating that "the proper exercise of the trial court's discretion requires a delicate balance between the defendant's due process right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice," and noting a six part test to make that determination).

4. However, that discretion is not absolute. Some courts, including the Court of Appeals for the Third Circuit have implemented a two step process to govern judicial decision-making with respect to when trials should be delayed in order for a defendant to obtain the counsel of his choice. Thus, in *United States v. Welty*, 674 F.2d 185, 190 (3d Cir. 1982), the Court of Appeals held that where a defendant makes an eve-of-trial request for new counsel of choice, courts must first determine if there was "good cause" for the removal of the previous attorney; if so, the continuance must be allowed, and if not, the court has discretion to grant or deny the request. *See also United States v. Peppers*, 302 F.3d 120, 132 (3d Cir.

2002) (noting that the Third Circuit has developed a "good cause" test for requests for new counsel, which states that where "there is good cause, the court is required to grant a continuance"); *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995) (explaining that the inquiry when determining whether to grant a continuance for new counsel under *Welty* is whether there was good cause for the request for new counsel); *McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987) (applying the *Welty* test where counsel sought to withdraw and defendant requested a continuance to find new counsel).

5. Other Circuits have likewise adopted such a "good cause" or similar test to determine whether a continuance to seek new counsel should be granted. *See United States v. Byrum*, 567 F.3d 1255, 1265 (10th Cir. 2009); *United States v. Woodward*, 291 F.3d 95, 108 (1st Cir. 2002); *United States v. Torres*, 793 F.2d 436, 440 (1st Cir. 1986); *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985); *United States v. Brown*, 744 F.2d 905, n.2 (2d Cir. 1984); *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981); *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973). A legitimate conflict of interest is by definition "good cause" for the removal of the previous attorney. *See id.*; *see also Goldberg*, 67 F.3d at 1097-98 (actual or potential conflicts of interest constitute good cause); *Welty*, 674 F.2d at 188, 190-91 (repeatedly noting that a conflict of interest constitutes good cause).

6. Other Circuits, however, do not apply such a good cause test. *See United States v. Reyes-Bosque*,

596 F.3d 1017, 1033 (9th Cir. 2010) (listing several factors district courts should consider when determining whether an eve-of-trial request for new counsel should be granted, none of which involve good cause for the removal of the original attorney); *Bowe*, 221 F.3d at 1190 (listing six factors, none of which include good cause for the removal of the original attorney, for courts to consider in determining if a continuance to procure counsel of his choice is appropriate); *United States v. Shepherd*, 102 F.3d 558, 564 (D.C. Cir. 1996) (noting that a balancing of factors, none of which include good cause for the removal of the original attorney, is necessary in determining whether a continuance to procure counsel of choice is necessary).

7. However, even in those Circuits in which a good cause rule has been adopted, courts frequently deny requests for continuances in order to obtain new counsel even where there is good cause for the removal of the original attorney, or where such continuances are denied, without performing the good cause analysis. *See United States v. Ellens*, 43 Fed. Appx. 746, 748-49 (6th Cir. 2002) (affirming denial of a continuance to procure counsel of choice where the original counsel had a conflict in that he had to testify at the proceeding); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984) (affirming denial of a continuance where counsel from the same firm as the original counsel represented defendant at trial); *United States v. Ragusa*, 664 F.2d

696, 701 (8th Cir. 1981) (affirming denial of a continuance where original counsel had withdrawn); *see also United States v. Koblitz*, 803 F.2d 1523, 1530 (11th Cir. 1986) (no further continuances would be granted even where attorneys were removed because of conflict of interest).

8. The result is a Circuit conflict not only with respect to whether there is a good cause rule at all, but as to how that rule applies, *i.e.*, what amount of discretion, if any, a court has to deny a continuance so that a defendant may exercise his right to the counsel of his choice where he has shown good cause for the dismissal of his prior attorney of choice.

9. Here, for example, the Court of Appeals did not even address Petitioner's good cause argument; rather, it simply noted that district courts have wide discretion in granting continuances, and then found no abuse of discretion in the district court's denial of a continuance. App. 3-5. In doing so, the court relied upon its earlier decision in *United States v. Kikumura*, 947 F.2d 72, 78 (3d Cir. 1991), which it cited for the proposition that the district court possesses wide discretion to grant or deny continuances where a defendant seeks new counsel.[4] App. 3. But in *Kikumura*, the defendant had not, in fact,

---

[4] The only other case cited by the Third Circuit on this issue, *United States v. Olfano*, 503 F.3d 240, 246 (3d Cir. 2007), does not even involve choice of counsel; the defendant in that case was appealing a denial of a continuance so he could better prepare for sentencing. App. 3-5.

demonstrated good cause; rather, after he had long been represented by a public defender, and on the eve of his scheduled sentencing hearing, he sought a continuance because he suddenly desired private counsel. *Id.* at 75. Under the circumstances, the court rightfully held that "[w]hile the Sixth Amendment affords some protection to the defendant's choice of counsel, when that choice comes into conflict with a trial judge's discretionary power to deny a continuance, the court will apply a balancing test to determine if the trial judge acted fairly and reasonably," and affirmed the trial court's decision to deny the continuance. *Id.* at 78.

10. By contrast, in this case, there was good cause for the removal of Nuzzi, Petitioner's counsel of choice, who was found to have an unforeseen and unwaiveable conflict of interest. App. 22. Moreover, Plaisted was unquestionably not retained by Petitioner to try his case; in fact, both Petitioner and Plaisted stated repeatedly that Petitioner never wanted Plaisted as trial counsel. As such, it is clear that Plaisted was forced upon Petitioner, even though Petitioner could afford counsel of his choice. *But see United States v. Washington*, 341 F.2d 277, 285 (3d Cir. 1965) ("A court cannot force services of an attorney upon a defendant against his wishes."). Under these facts, and particularly where there was good cause for the removal of Nuzzi, Petitioner should have been granted a continuance to procure counsel of his choice. *See Welty*, 674 F.2d at 190; *Peppers*, 302 F.3d at 132; *Goldberg*, 67 F.3d at 1098; *Fulcomer*, 821 F.2d at 942.

11. The recurring problem of the extent of a trial court's discretion to grant a continuance so that a defendant may obtain the counsel of his choice, where his prior counsel is replaced for good cause, and the conflicting analyses that it has spawned, have never been addressed by this Court. The Court's most recent pronouncement on the issue of counsel of choice, *Gonzalez-Lopez,* did not deal with the issue of continuances, but rather with an erroneous denial of admission *pro hac vice* of defendant's counsel of choice. *See* 548 U.S. at 140. In *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), the issue was whether a statute, which provides no exception for property used to pay attorney fees, impermissibly burdens a defendant's Sixth Amendment right to retain counsel of his choice. In *Wheat*, the issue was the trial court's discretion in allowing waivers of conflicts of interest, and its discussion of limitations on the right to counsel of choice was limited to situations where specific counsel could not ethically be retained; again, it did not involve a request for a continuance. *See* 486 U.S. at 153. Finally, *Morris v. Slappy*, 461 U.S. 1, (1983), decided twenty-seven years ago, involved a request for a continuance because defendant claimed his attorney was not prepared for trial, not, as here, where counsel was removed for good cause. In *Morris*, the defendant, who was represented throughout by the public defender, sought a continuance because he felt that the public defender did not have enough time to prepare for his case; unlike Plaisted in this case, who repeatedly noted that he was "not prepared to

confront the prosecutor's evidence," the public defender disagreed, stating he was well prepared for trial. *See* 461 U.S. at 6. In essence, the request for a continuance in *Morris* was based on the defendant's lack of confidence in his counsel; the Court held that the Sixth Amendment did not, however, guarantee a positive attorney-client relationship and, citing trial courts' wide latitude in granting continuances, affirmed the trial court's decision to deny the continuance. *See id.* at 11-13. But *Morris* did not in any way address the issues in the context of the good cause removal of an attorney.

12. Given the conflict in the Circuits in terms of whether there does or does not exist a good cause test to determine whether a continuance should be granted to allow a criminal defendant to exercise the right to the counsel of his choice, and the confusion engendered even in those Circuits where such a rule exists, this Court should, in a context that is at once common and of core constitutional significance, grant certiorari in order to consider such a rule and, once adopted, set forth the manner in which it should be applied.

C. This Court's Intervention Is Necessary To Place Limits On The Pervasive Practice Of Admitting Bad Acts Testimony About Uncharged Crimes In Drug Cases Where The Basis For Such Admission Is The Parroting Of The Abstract Exceptions Articulated In Federal Rule of Evidence 404(b)

1. Federal Rule of Evidence 404 bars evidence of a person's character or a trait of character introduced for the purpose of proving action in conformity therewith. Fed. R. Ev. 404(a). This Court has long recognized that such bad acts evidence is highly prejudicial, and at least presents the risk of being less than sufficiently probative to justify its admission. *See Old Chief v. United States*, 519 U.S. 172 (1997) ("There is . . . no question that propensity would be an 'improper basis' for conviction and that evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence."); *see also United States v. Johnson*, 439 F.3d 884, 887 (8th Cir. 2006) ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.") (*quoting* Fed. R. Ev. 404 advisory committee notes (1972)); *United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (noting

that "[a]dmission of bad acts evidence must be carefully scrutinized"); *United States v. Curtis*, 280 F.3d 798, 803 (7th Cir. 2002) ("Because 'almost any bad act evidence simultaneously condemns by besmirching character and by showing one or more [of the admissible purposes under Rule 404(b)],' [citation omitted], the rule must not be applied mechanically, but instead carefully considered under the given circumstances."); *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) ("Although the government will hardly admit it, the reasons proffered to admit prior-bad-act evidence may often be a Potemkin, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character."). The problem is particularly acute where, as here, the evidence of such bad acts is uncorroborated. *See Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962) (holding "that the [prior bad acts testimony], not having been corroborated by the production of a contemporaneous report or otherwise substantially corroborated, was so prejudicial to the accused in his defense of the charge on trial as to outweigh the probative value of the testimony").

3. To be sure, the Federal Rules of Evidence recognize that such evidence can be admitted in limited circumstances. Fed. R. Ev. 404(b). Thus, Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

> person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

4. In many cases, prosecutors properly invoke the reasons articulated in Rule 404(b) and thereby justify the admission of prejudicial bad acts testimony. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988) (affirming admission of "similar acts" evidence under 404(b), while noting "[w]e share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b)"). However, often, as here, they simply parrot the language of Rule 404(b), without explaining how that evidence demonstrates "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See United States v. Oaks*, 606 F.3d 530, 539 (8th Cir. 2010) (upholding admission of a prior conviction for aggravated robbery, where defendant was charged with gun possession, simply because "[a]ccording to the government, it was relevant in this instance to prove Oaks's knowledge and intent"); *United States v. MacCullum*, 584 F.3d 471, 475-76 (2d Cir. 2009) (holding that where "the government offered McCallum's prior convictions ostensibly to establish McCallum's intent to deal drugs and his knowledge of drug dealing," the evidence was admissible because "McCallum did not concede those issues"). Likewise, in this case, the prosecution introduced a

day and a half of detailed, uncorroborated testimony about alleged bad acts that spanned a period of seven years prior to the earliest date in the indictment, and involved schemes, locations, suppliers and distribution mechanisms totally unrelated to the allegations in the indictment, simply because the prosecution said it demonstrated "motive, intent, opportunity, plan, preparation, knowledge, identity, and absence of mistake or accident." App. 57.

5. The problem is that courts frequently accept and even sanction this type of conclusory, unhelpful argument that does not reference the limited circumstances in which Rule 404(b) evidence may be permitted. For example, the Court of Appeals for the Third Circuit has specifically stated that it favors admission of Rule 404(b) evidence "if relevant for any purpose other than to show mere propensity or disposition on the part of the defendant to commit the crime." *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999). Other Circuits have likewise instructed their trial courts. *See United States v. Harris*, 661 F.2d 138 (10th Cir. 1981) (following the precedent that "evidence of other offenses may be received for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime"); *United States v. DiZenzo*, 500 F.2d 263, 265 (4th Cir. 1974) ("Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."). In other words, the way that Rule 404(b) has been applied grants prosecutors *carte blanche* to offer

uncorroborated testimony about prior bad acts, whether or not they tie that admissibility to one of the bases in the rule, and often when they do no more than simply mention one of the reasons articulated therein. *See Oaks*, 606 F.3d at 539; *MacCullum*, 584 F.3d at 475-76.

6. This problem is particularly acute in drug conspiracy cases, like this one. *See United States v. Trogdon*, 575 F.3d 762, 766 (8th Cir. 2009) (holding that the district court did not abuse its discretion, in prosecution for conspiracy to distribute marijuana, in admitting defendant's prior conviction because the eleven year old conviction was relevant to material issues of defendant's intent and knowledge, even where defendant had conceded intent and knowledge of the marijuana). Under the reasoning of the Third Circuit and others, virtually any evidence of any bad act, as long as it is tangentially related to drugs, is admissible. The simple fact is that if the prior bad acts are related to drugs, the disturbing trend is that courts will accept the statements of prosecutors mentioning any of the bases articulated in Rule 404(b) regardless of the fact that prior drug dealing may or may not establish motive, intent, knowledge, or absence of mistake. *See, e.g., United States v. Thomas*, 593 F.3d 752, 757-58 (8th Cir. 2010) (allowing evidence of other crack cocaine trafficking to prove intent on the ground that intent is *always* at issue in a drug case and writing "[t]his is not the first time we have held knowledge and intent are material issues in cases involving distribution of narcotics [and] [e]vidence of other acts is generally admissible

to establish those elements."); *United States v. Conner*, 583 F.3d 1011, 1022 (7th Cir. 2009) (even though the defendant did not contest elements of knowledge and intent that did not preclude government from introducing evidence of defendant's other drug activity to prove knowledge and intent: "[i]n drug cases, we have often found a defendant's other drug transactions relevant for purposes other than propensity, such as knowledge, intent, and lack of mistake."). The reason is clear: prosecutors wish to draw the powerful and prejudicial, but inappropriate inference that the Rule is not supposed to allow – that once a drug dealer, always a drug dealer.

7. The trend continues here, where the district court allowed Walker to testify for a day and a half about alleged prior bad acts, all of which were uncorroborated and many of which had no relevance whatsoever to the government's case. In support of its application for admission of this evidence, the government parroted the exceptions articulated in Rule 404(b), and claimed it needed the testimony to establish the facts surrounding the conspiracy, and to show that Petitioner "trusted" Walker. App. 57; App. 61. However, much of the testimony was unrelated to the conspiracy, involving individuals, schemes and activities unrelated to the accusations in the indictment.

8. Most disturbingly, the trial judge failed to make any attempt to limit the scope or effect of this evidence, or to require, as more details came out, that it be linked to the reasons articulated by the prosecution, even as it allowed hour after hour of

detailed testimony, covering hundreds of pages of transcript, about bad acts that occurred over a period of seven years prior to the indictment, including stories about numerous bad acts totally unrelated to the indictment. In this regard, the decision of the Court of Appeals conflicts with those of other courts which have allowed such evidence. *See, e.g., Trogdon*, 575 F.3d at 766 ("[o]nly the fact of conviction, date, and drug type were introduced by the government, without any details of the crime"); *United States v. Ward*, 211 F.3d 356, 362 (7th Cir. 2000) (limiting the testimony about several years of uncharged drug dealing to the witness's statement that he "began selling and transporting drugs for Ward in approximately 1987 and continued to do so until he was arrested in 1993").

8. Given the unfortunate and unjust trend to allow Rule 404(b) evidence based upon conclusory prosecutorial statements, merely parroting the language of the Rule, this Court's intervention is necessary to describe the showing that prosecutors are required to make in order to prevent Federal Rule of Evidence 404(b) from becoming a vehicle, particularly in drug conspiracy cases, for the admission of improper propensity evidence and the unfair trial that inevitably results. Given the extreme nature of the testimony allowed in this case, testimony that covered hundreds of pages of trial transcripts, the petition for a writ of certiorari should be granted on this basis as well.

CONCLUSION

For the reasons set forth above, Petitioner Hakeem Curry respectfully requests that the Court grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

LAWRENCE S. LUSTBERG, ESQ.
Counsel of Record

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
llustberg@gibbonslaw.com

ANDREW B. SMITH, ESQ.
SMITH + SCHWARTZSTEIN LLC
18 MacCulloch Ave.
Morristown, New Jersey 07960
(973) 206-1725

Attorneys for Petitioner
Hakeem Curry

Dated: June 30, 2010

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1411

UNITED STATES OF AMERICA

v.

RAKIM BASKERVILLE,

Appellant

(D.C. Criminal No. 2-04-cr-00280-11)

No. 07-1467

UNITED STATES OF AMERICA

v.

HAKEEM CURRY
a/k/a IBN a/k/a E.T. HAK
a/k/a MR. EDDIE a/k/a DOUGH BOY
a/k/a MT. GORE

Hakeem Curry,

Appellant

(D.C. Criminal No. 2-04-cr-00280-002)

On Appeal from the United States District Court for the District of New Jersey
District Judge: Honorable Faith S. Hochberg.

Submitted Under Third Circuit LAR 34.1(a)
on July 13, 2009

Before: RENDELL, FUENTES, and ROTH,
Circuit Judges.

(Filed: July 30, 2009)

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Appellants Rakim Baskerville[1] and Hakeem Curry[2] were tried as co-defendants on charges relating to an alleged drug conspiracy. Both were convicted of conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine and one kilogram or more of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 21 U.S.C. § 846. Curry was also convicted of possession with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and

---

[1] Footnote 2, page 8, of Appellant Baskerville's Brief states that the correct spelling of his first name is "Rakeem," but that he has used the spelling "Rakim" for consistency with the trial court record; accordingly, we have adopted this spelling herein.

[2] Footnote 2, page 11, of Appellant Curry's Brief states that the correct spelling of his last name is "Currie," but that he has used the spelling "Curry" for consistency with the trial court record; accordingly, we have adopted this spelling herein.

nine counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Both Curry and Baskerville appeal their convictions. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Curry argues that the District Court violated his Sixth Amendment right to counsel by denying his request for a continuance in order to replace a member of his defense team. This Court reviews a District Court's denial of a continuance for abuse of discretion. *United States v. Kikumura,* 947 F.2d 72, 78 (3d Cir. 1991). In determining whether to grant a continuance, a court should consider: "the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare a defense; and the rights of other defendants awaiting trial who may be prejudiced by a continuance." *Id.* This Court will only vacate a conviction based on a refusal to grant a continuance if the denial was arbitrary and substantially impaired the defendant's opportunity to receive a fair trial. *United States v. Olfano,* 503 F.3d 240, 246 (3d Cir. 2007). Here, it is clear from the District Court's twenty-one page opinion, which thoroughly balanced numerous factors, that the denial of a continuance was neither arbitrary nor prejudicial.

Curry requested a fourth continuance so that he could replace Vincent Nuzzi, a member of his defense team, who withdrew due to a conflict of interest. Nuzzi notified the Court of the conflict only a week before trial. Nuzzi purportedly discovered the conflict after listening to tapes of wiretapped recordings that

the Government had produced two years earlier, and which the Court had instructed counsel to review carefully a year before trial. In denying the request for a continuance, the Court carefully weighed various factors, including: 1) the length of the delay that defendant requested; 2) the actual length of delay that would be needed for a third attorney to familiarize himself with the complexity of the case and the two-year history of pretrial proceedings; 3) whether the Court had granted other continuances; 4) inconvenience to the other litigants, witnesses, counsel and the court; 5) efficient judicial administration; 6) whether there had been veiled attempts to delay the trial; 7) whether defendant had counsel who were highly knowledgeable of his case; 8) whether there would be a Sixth Amendment violation if the trial proceeded with two attorneys who defendant retained rather than delaying the requisite time for a third attorney to get "up to speed"; 9) the complexity of the case; and other factors unique to this case.

In discussing these factors, the Court noted that Curry still retained James Plaisted and Lin Solomon, and that Plaisted had acted as lead counsel for over two years, while Nuzzi had been absent trying a different case. The Court further recognized that Plaisted and Solomon had written hundreds of pages of motions, scrutinized all of the evidence that the Government produced and demonstrated an extraordinary command of every aspect of the case. In addition, the Court stressed that Curry never demonstrated any dissatisfaction with Plaisted and

Solomon, but that Curry stated that he did not want Plaisted to do "all" of the trial by himself. Given these facts and the nine months that the District Court estimated it would take for a new lawyer to get up to speed in the case, we find that the District Court's decision to only grant a limited continuance to allow Plaisted and Solomon to prepare for opening statements was neither arbitrary nor prejudicial.

Both Curry and Baskerville argue that the District Court erred in refusing to hold a taint hearing regarding evidence that the Government derived from calls that were not properly sealed and that were intercepted after the wiretapping order expired. This Court reviews the denial of a taint hearing for abuse of discretion. *United States v. Bissell*, 634 F.2d 1228, 1232-33 (9th Cir. 1980).

The Government produced and identified evidence that it admittedly collected outside the scope of its warrants ("Unused Calls"). It brought the error to the attention of the District Court, stated that it would not use any of the Unused Calls for any purpose, and was ordered by the District Court not to use any of the Unused Calls. The Government also explained that it did not use any evidence from the Unused Calls during its investigation. Although the Government has the ultimate burden of proof to demonstrate that its evidence is untainted, the defendant "has the initial burden of establishing a factual nexus between the illegality and the challenged evidence." *United States v. Kandik*, 633 F.2d 1334, 1335 (9th Cir. 1980).

The Government produced all of the Unused Calls, the affidavits that it submitted in support of wiretapping applications and search/arrest warrants and its trial exhibits, yet the Appellants point to *no* specific evidence that they believe was tainted. Rather, they claim that an evidentiary hearing was necessary to review *all* of the Government's evidence to ensure that none of it was tainted. Such a request is parallel to that in *Kandik,* in which the Court of Appeals for the Ninth Circuit held that, "[i]n the instant case, the illegally seized evidence is known to all parties, and any connection between it and the challenged testimony would be readily traceable. A hearing in this case is unnecessary, and would not help Kandik establish the taint." *Kandik,* 633 F.2d at 1336. Similarly, in *United States v. Williams,* 580 F.2d 578, 586-87 (D.C. Cir. 1978), the court denied an evidentiary hearing because the appellants did not point to any taint from the illegal wiretap. The court noted that "aside from the general assertion that some information sources may have been developed through the use of the prior illegal wiretaps, appellants have based no arguments specifically on the transcripts in their possession." *Williams,* 580 F.2d at 587 n.48. The court found this failure sufficient to deny an evidentiary hearing.

Here, as noted, the Defendants possessed all of the evidence that the Government obtained illegally, but they never objected to any specific evidence as tainted and failed to identify any evidence as tainted in their briefs. Thus, we find that the District Court

did not abuse its discretion in denying a taint hearing after the Government identified the Unused Calls and assured the Court that no evidence derived from those calls was to be used at trial.

Curry and Baskerville raise several other issues on appeal. Curry argues that the District Court erred in allowing the government to impeach a defense witness and in declining to permit redirect examination of a defense witness. Baskerville argues that there was insufficient evidence to establish his involvement in a conspiracy, and that the District Court erred by joining him with the other defendants, denying his motion for a Rule 14 severance, failing to grant a mid-trial severance *sua sponte*, and denying an evidentiary hearing regarding the evidence seized from his house and his minivan. Baskerville further argues that the Government engaged in prosecutorial misconduct. Both Curry and Baskerville also argue that the District Court erred by admitting evidence of uncharged drug dealing prior to the date specified in the indictment. We have reviewed the record and conclude that none of these additional arguments have merit.

Accordingly, we will AFFIRM the Orders of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1411

UNITED STATES OF AMERICA

v.

RAKIM BASKERVILLE,

Appellant

(D.C. Criminal No. 2-04-cr-00280-11)

No. 07-1467

UNITED STATES OF AMERICA

v.

HAKEEM CURRY
a/k/a IBN a/k/a E.T. HAK
a/k/a MR. EDDIE a/k/a DOUGH BOY
a/k/a MT. GORE

Hakeem Curry,

Appellant

(D.C. Criminal No. 2-04-cr-00280-002)

On Appeal from the United States District
Court for the District of New Jersey
District Judge: Honorable Faith S. Hochberg

Submitted Under Third Circuit LAR 34.1(a)
on July 13, 2009

Before: RENDELL, FUENTES, and ROTH,
Circuit Judges.

JUDGMENT

(Filed Jul. 30, 2009)

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on July 13, 2009. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the Judgment and Commitment Orders of the District Court entered, respectively, on February 2, 2007 (as to Defendant-Appellant Baskerville), and on February 16, 2007 (as to Defendant-Appellant Curry), be and the same are hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: 30 July 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

April 27, 2009

No. 07-1467

USA

Appellee

V.

Hakeem Curry

Appellant

(USDC for the District of NJ|04-cr-00280-002|)

Present: Rendell, Fuentes and Roth, *Circuit Judges.*

1) Motion by Appellant for Leave to File Supplemental Appendix and for Leave to File Overlength Reply Brief.

2) Motion by Appellant for Leave to Expand the Record.

3) Response by Appellee to Motion to Expand the Record and for Leave to File a Supplemental Appendix.

4) Reply by Appellant to Motion to Expand the Record and to File a Supplemental Appendix.

/s/ Erica M. Ayala
Erica M. Ayala
(267) 299-4941
Briefing Specialist/
Court Crier

Calendared: July 13, 2009

ORDER

(Filed Aug. 5, 2009)

The foregoing motions are DENIED.

By the Court,

/s/ Marjorie O. Rendell
Circuit Judge

Dated: August 5, 2009

EMA/cc: Lawrence S. Lustberg, Esq.
Andrew B. Smith, Esq.
Claudia Van Wyk, Esq.
George S. Leone, Esq.
Steven G. Sanders, Esq.

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES
OF AMERICA

v. Case Number 04-00280-002

HAKEEM CURRY

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed
On or After November 1, 1987)

(Filed Feb. 13, 2007)

The defendant, HAKEEM CURRY, was represented by James Plaisted, Esq. and Lin Solomon, Esq.

The defendant was found guilty on counts 1, 3, 6, 7, 8, 9, 10, 11, 12, 13 and 14 by a jury verdict on July 24, 2006 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Numbers
21:846 [21:841(a)(1) & (b)(1)(A)]	Conspiracy to Distribute Five Kilograms or More of Cocaine and One Kilogram or More of Heroin	December 2005	1

21:841(a) & (b)(1)(B)	Distribution and Possession with Intent to Distribute 100 Grams or More of Heroin	March 5, 2004	3
18:1956(a)(1)(B)(l)	Conspiracy to Launder Narcotics Proceeds	January 29, 2004	6, 7, 8, 9, 10, 11, 12, 13 and 14

As pronounced on February 7, 2007, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553(a).

It is ordered that the defendant shall pay to the United States a special assessment of $1,100.00, for counts 1, 3, and 6-14, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 13th day of February, 2007.

/s/ Faith S. Hochberg
FAITH S. HOCHBERG
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for the remainder of defendant's natural life on Count 1 of the Indictment. The defendant is committed to the custody of the Bureau of Prisons for a term of 480 months on Count 3 of the Indictment, to be served concurrently with the sentence on Count 1 of the Indictment. The defendant is committed to the custody of the Bureau of Prisons for a term of 240 months on each of Counts 6, 7 and 8 of the Indictment, to be served concurrently with one another and concurrently with the sentence on Counts 1 and 3 of the of the Indictment. The defendant is committed to the custody of the Bureau of Prisons for a term of 240 months on each of Counts 9, 10 and 11 of the Indictment, to be served concurrently with one another and with the sentences on Counts 1 and 3 of the Indictment, but to be served consecutively to the sentences on Counts 6, 7 and 8 of the Indictment. The defendant is committed to the custody of the Bureau of Prisons for a term of 240 months on each of Counts 12, 13 and 14 of the Indictment, to be served concurrently with one another and with the sentences on Counts 1 and 3 of the Indictment, but to be served consecutively to the sentences on Counts 6, 7 and 8 of

the Indictment and the sentences on Counts 9, 10 and 11 of the Indictment.

The Court makes the following recommendations to the Bureau of Prisons: the Court recommends that the Bureau of Prisons designate defendant to an appropriate facility where no other member of the Curry Organization is incarcerated.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

FINE

The defendant shall pay a total fine of $8,000,000.

This fine, plus any interest pursuant to 18 U.S.C. § 3612(f)(1), is due immediately and shall be paid in full within 30 days of sentencing.

This amount is the total of the fines imposed on individual counts, as follows: $2,500,000 on Count 1, $1,000,000 on Count 3, and $500,000 on each of Counts 6, 7, 8, 9, 10, 11, 12, 13 and 14.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. HAKEEM CURRY[2], et al., Defendants.	Criminal No. 04-280 Hon. Faith S. Hochberg, U.S.D.J. Statement of Reasons for Granting Defense Counsel Nuzzi's Motion to Withdraw on Grounds of Actual Conflict of Interest[1] and Denying Motion for Reconsideration February 13, 2007

Hochberg, District Judge:

Defendants were arraigned on this long and complex conspiracy case on August 4, 2004. Defendant Curry is the lead Defendant in the case,

[1] These evidentiary findings shall serve as a supplement to those stated by the Court on the record on May 11, 2006 and May 15, 2006.

[2] Mr. Curry's counsel has made a post-trial request that the court use the "ic" spelling instead of the "y" spelling when referring to Mr. Curry. However, because all of the Court documents, including the defense motions and briefs, spell Mr. Curry's name with the "y", the Court will continue to do so not out of any disrespect to Mr. Curry but so that the documents remain consistent. In his prior judgments of conviction, "Curry" is spelled both ways.

which includes 17 members of a violent drug gang.[3] After granting multiple adjournments of the trial date at the request of multiple defense counsel, a trial date of May 3, 2006 was sought by Curry's defense team. That date was granted by this Court. As will be stated in greater detail below, this Court patiently and repeatedly accommodated the Curry defense team's other trial schedules in order to ensure that Curry was defended by the team of attorneys that he had privately retained: James Plaisted, Esq. (of the large defense firm of Walder, Hayden and Brogan), Plaisted's associate counsel, Lin Solomon, Esq., of the same firm, and Vincent Nuzzi, Esq. (hereinafter referred to as the "Plaisted/Solomon/Nuzzi team").

Shortly before trial, an additional adjournment was granted until May 15, 2006, at the request of Messrs. Plaisted and Nuzzi on the grounds that Mr. Nuzzi was not adequately prepared for trial because he had been working on another long trial until April 2006. Mr. Nuzzi's request for more time to prepare was also the subject of a mandamus petition to the Third Circuit Court of Appeals; the petition was filed April 18, 2006 and denied on May 8, 2006.

On May 8, 2006, one week before the trial was finally to commence, this Court received a letter from the United States Attorney's Office, informing the Court that Mr. Nuzzi had a potential dual

---

[3] Some of these gang members were charged under separate charging documents.

representation conflict of interest. The potential conflict arose from Nuzzi's prior representation of another client on state criminal charges related to one of the big drug seizures in the Curry case. As Mr. Nuzzi had not informed the Court himself, despite his duty to do so, the United States Attorney's Office notified the Court in order to ensure that an inquiry was made in advance of trial. Dual representation may be waived if counsel has obtained the requisite consents of each client. *See Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980) (finding that: 1) defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict arises; and 2) courts necessarily rely in large part upon the good faith and judgment of defense counsel to have received the proper waivers if they accept dual representation); *Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978) (deferring to the judgment of counsel regarding the existence of a disabling conflict, recognizing that a defense attorney is in the best position to determine when a conflict exists, that he has an ethical obligation to advise the court of any problem, and that his declarations to the court are "virtually made under oath."). The Court immediately ordered defense counsel to consult with Curry forthwith and set an evidentiary hearing for May 11, 2006 on the matter.

On May 9, 2006, Nuzzi responded to the letter of the United States Attorney's office. His letter, received a mere five days before trial, for the first time acknowledged to this Court that he did indeed

have a conflict of interest based on dual representation. Of even of greater concern, he added that he had an "actual conflict of interest" with his own client because he believed that he should call himself as a defense witness on a significant substantive aspect of the case. Specifically, he stated that he would testify to rebut the Government's evidence that Curry led the violent drug gang by, *inter alia*, securing and paying for defense lawyers when his subordinates were arrested. It was well known long before trial that the Government intended to offer evidence to prove Curry's leadership role by putting up bail money and securing counsel for gang members so that none would cooperate with law enforcement. In return, gang members were controlled by Curry because the gang's "house counsel," Paul Bergrin, Esq.'s[4] loyalty was to Curry, and the gang members owed Curry for the value of drugs seized in any bust.

Two wiretapped calls corroborate the prosecution witnesses' anticipated testimony on this issue proving leadership and control of the drug organization by Curry. Call #1211 is a phone call between Nuzzi's client, Curry, and Nuzzi's former client, Webb, in which Curry tells Webb that he will funnel funds to Nuzzi via his "man" to get Nuzzi paid to defend Webb. Call #1212 is a second phone call between Curry and

---

[4] Nothing has been presented to indicate that Bergrin's recent arrest and indictment for allegedly running a brothel and money laundering its proceeds relate to this case.

another co-conspirator in this case in which Curry also talks about getting money to Nuzzi to defend Webb.[5] As will be discussed below, Nuzzi had these tapes at least a year before trial, and statements made by Nuzzi at that time revealed that he had listened to several involving Curry.

---

[5] Nuzzi's former client Webb had been arrested with Curry co-Defendants Justin and Jason Hannibal following a police chase from a hotel in Elizabeth, NJ; this bust led to a seizure from the Hannibal hotel room of one of the largest caches of drugs and cash in the case. These narcotics and cash, and related testimony, were linked via the Hannibals to Curry, who forced the Hannibals to repay him for the lost drugs and cash by forfeiting their Rolex watches. The Hannibals were charged as co-conspirators in the instant case, and pled guilty to conspiring with Curry and others. Webb was charged in a case in the State of New Jersey in connection with the police chase. Nuzzi testified at the May 11, 2006 hearing that the Hannibal twins could not be called as defense witnesses because their plea allocutions implicated Curry; and he would therefore be considering calling his own former client Webb as a defense witness if the Government introduced at trial this large drug seizure against Curry, which it had every right to do and planned to do. While there might have been solutions to this dual representation issue, such as waivers and requiring co-counsel Plaisted to examine Webb (to avoid use of confidential communications to Nuzzi arising from the prior representation) these solutions became moot after Nuzzi announced that he intended to be a defense witness himself on Curry's behalf. Nuzzi is an experienced former prosecutor, as is Plaisted. Why these attorney ethics issues were not brought to the Court's attention by them is inexplicable. When the case was just days away from the jury being empaneled and sworn, the United States Attorney's Office took on that duty.

On May 11, 2006, three days before trial, this Court held an evidentiary hearing on this issue. Nuzzi testified that he had an "actual conflict of interest" and moved to be relieved as Curry's counsel. Nuzzi testified: "I've become a witness in this case on behalf of my current client, Mr. Curry, to explain the events relating to my retention by Mr. Webb," "Somebody has to defend my client with regard to the context of the conversation and my relationship with Mr. Webb," and "there are other issues besides the two tapes, and that's the surrounding circumstances where the only person that could be called as Mr. Curry's witness to explain the surrounding circumstances is my client, Mr. Webb. So there were really two bases [for the withdrawal motion]. . . " My testimony, . . . if I were called as a witness, my testimony would be to rebut the inference that the Government wishes to draw from those tapes." Transcript of May 11, 2006, pp. 16, 39, 41. The Court directly asked Mr. Nuzzi if the conflict of interest caused by his intention to be a defense witness was a waivable conflict should Mr. Curry wish to waive it. Nuzzi unequivocally stated that the conflict was not waivable. He was given additional private consultation time with Mr. Curry to discuss the issue, and this Court did not intrude into attorney client communications. Nuzzi's position remained the same: He was going to be a defense witness for Curry and the jury could not see him in both roles. Nuzzi stated that the conflict was not waivable.

After a lengthy hearing, this Court granted defense counsel Nuzzi's request to be relieved as defense counsel. Among other reasons, New Jersey RPC 3.7 did not state that such a conflict was waivable, and Nuzzi would thus be conflicted between his own concerns about potential ethics jeopardy himself under RPC 3.7 and his duty to zealously defend Mr. Curry by calling himself as a witness. Both he and Mr. Plaisted would be clearly identified to the jury as the defense counsel team for Mr. Curry, and thus Mr. Nuzzi taking the witness stand under these circumstances would be highly unusual and could damage Mr. Curry, depending on how the jury reacted to Nuzzi, the witness, as contrasted with Nuzzi, the defense counsel. Mr. Curry's desire to rebut his control of his subordinates' counsel was important to the defense (as the later trial strategy confirmed when Nuzzi was in fact called by Plaisted as a defense witness).

This Court considered having a waiver colloquy. However, even if Curry said before trial that he wished to waive his right to call Nuzzi as a defense witness, Nuzzi himself did not believe that such a waiver would be valid. This Court thus had to:

> pass on the issue of whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between the parties are seen through a glass, darkly. The likelihood and dimensions of

> nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. . . . A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderable are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics.

Wheat v. US., 486 U.S. 153, 162-63 (1988).

Here, this Court was faced with determining whether a criminal defendant could enter a knowing and voluntary waiver of his right to call Mr. Nuzzi as a defense witness before a three-month trial began. Moreover, defense counsel did not believe that the conflict was waivable. Thus, this Court concluded that it would not engage in a waiver colloquy because a waiver under these circumstances might not be "knowing and intelligent" before trial.

Even if the Court disagreed with Mr. Nuzzi about whether the conflict was waivable, which it did not, it would add yet another problem to effectively force Mr. Nuzzi to remain as a defense counsel when he did not believe that he could do so without further ethics jeopardy to himself. The Rules of Professional Conduct instruct that the mere likelihood of defense counsel being called as a witness raises concerns about the administration of justice. *See Freeman v. Vicchiarelli*, 827 F. Supp 300, 303 (D.N.J. 1993)

(noting that RPC 3.7 "begins to operate as soon as the attorney knows or believes that he will be a witness at trial" and that "[o]nce an attorney recognizes that he is 'likely' to be a witness in litigation, he must choose whether he will proceed as advocate or witness").

It is important to underscore that at *no time* did the Government seek to disqualify or remove defense counsel. Indeed, it was clear to this Court from the letter briefs filed before the May 11, 2006 hearing that the United States Attorney's Office had offered various redactions and other means to enable Mr. Nuzzi to remain part of the Plaisted/Solomon/Nuzzi defense team. It was solely Nuzzi who desired to be relieved as counsel, and his motion was granted.

While Mr. Nuzzi sought to blame the Government for this situation, it is without basis. *See Cuyler v. Sullivan*, at 346-47. Opposing counsel can reasonably assume that Mr. Nuzzi knows how to obtain waivers from his clients and would not proceed with dual representation absent proper waivers from his clients. *See Cuyler*, 446 U.S. at 346-47. In *Cuyler*, the Supreme Court found that it is defense counsel's ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict arises, and that Courts necessarily must rely on the good faith and judgment of defense counsel. Nuzzi's attempt to blame the Government based on the name on the cover page of the initial draft of the wiretap

transcript is spurious.[6] The two tapes had been produced *years* earlier in June 2004 during discovery. See Transcript of May 11, 2006, pp. 10. A year before trial, this Court told Mr. Plaisted "you have an obligation . . . to go through every one of those transcripts yourself, with the assistance of Mr. Nuzzi and Miss Solomon, and all the other persons that you

---

[6] In listening to the tapes of his own client, Curry, Nuzzi could hear Curry mention Nuzzi by name to a man named Webb. It makes no difference whether the draft cover page listed Curry talking to Jarvis or Raheem Webb. Once Curry stated Nuzzi's name in the wiretapped conversation, with either Webb, Nuzzi was obligated to listen to the tape himself and ascertain who was saying what about Nuzzi. Nuzzi had the tapes themselves and transcripts that contained his own name in the conversation for nearly two years, and the final transcripts for a substantial period of time prior to the trial. As the Court advised all counsel on June 15, 2005, a year before trial, it was defense counsel's duty to listen to all the tapes ("there is a ton of evidence") in the case (the Court told counsel to "put the earphones on and listen to it themselves") and look at the rough drafts of the transcripts and decide which were important and how/whether they should be used. Transcript of June 15, 2005, pp. 59-64. It was Plaisted and Nuzzi's duty to listen to those tapes and raise to the Court any ethics concerns. An attorney's own ethics burden is not properly shifted to or blamed upon the Government under the facts of this case. Both Nuzzi and Plaisted testified on May 11, 2006 that they had actually listened to the tape in which Nuzzi's two clients were talking to each other about Curry funneling money to Nuzzi to defend Raheem Webb at the latest by April 6, 2006. They thus knew that Nuzzi had a major conflict of interest with a concomitant obligation to bring it to the attention of this Court. They did not. One thing is certain: there is no excuse for this by blaming the Government.

can put together and you figure out which transcripts are important." Transcript of June 15, 2005, p. 62.[7]

MOTION FOR RECONSIDERATION AND ADJOURNMENT[8]

On May 15, 2006, this Court addressed Mr. Plaisted's motion to reconsider the Court's May 11, 2006 decision to grant Mr. Nuzzi's motion to withdraw as co-counsel. The Court also considered Mr. Plaisted's request for another adjournment of the trial date so that Mr. Curry could bring in a third attorney to try the case with Mr. Plaisted and Ms. Solomon. Mr. Plaisted effectively withdrew his motion to reconsider the granting of Mr. Nuzzi's motion to withdraw and stated that he did not wish the Court to conduct a waiver colloquy.

---

[7] In fact, it is clear that Curry's counsel had been listening to the tapes by June 2005, a full year before the trial. At that time, in attempting to obtain certain additional discovery from the Government, Mr. Nuzzi's comments show that he had listened to tapes of Curry talking about, *inter alia*, the identity of members of a drug task force. See Transcript of June 15, 2005, p. 85.

[8] Baskerville's attorney, Mr. Archie, joined the Nuzzi/Plaisted request for an adjournment on April 25, 2006. Mr. Archie stated that he was retained to represent Baskerville in January 2006 and had not had enough time to review the wiretaps with his client. The Court granted a continuance until May 15, 2006, for jury selection for the benefit of all defense counsel, and gave all defense counsel until May 22, 2006 to prepare their opening statements.

This Court granted a short additional adjournment to Mr. Plaisted and took other action designed to assist him in his final preparations for trial but did not grant a long adjournment of the long-delayed trial for a fourth time to facilitate a desire by Curry to hire a third attorney to try the case with Mr. Plaisted and Ms. Solomon. On that date, the Court stated that it would file this Statement of Reasons. In making its decision, this Court balanced many factors, based on its own extensive knowledge of the case and nearly two years presiding at many hearings where Curry's privately-retained counsel, Plaisted, demonstrated his extraordinary grasp of the facts of the case as lead counsel. Mr. Nuzzi was often not even present at these hearings and certainly had not acted in a lead role at any time during nearly two years leading up to the trial, when extensive trial preparatory work had proceeded apace. This Court had also read hundreds of pages of briefs written by Mr. Plaisted and Ms. Solomon, which revealed their deep knowledge of the case.

This Court balanced numerous considerations based on the particular facts of this case in order to ensure that Mr. Curry's Sixth Amendment rights were always protected. This Court has, in this balancing of factors, considered both Mr. Curry's right to pay for privately retained counsel of his choice, as well as Mr. Curry's right to effective assistance of counsel. *United States v. Gonzalez-Lopez,* 126 S. Ct. 2557 (2006). All of Curry's Sixth Amendment rights have always been uppermost in this Court's mind as

it balanced, *inter alia*, the following factors: a) the length of the delay that was requested by Mr. Plaisted; b) the actual length of the delay that would be needed for a third counsel of choice to become familiar with the exceptional complexity of this case and its two-year history of protracted pretrial proceedings; c) whether other continuances have been requested and granted; d) the degree of convenience or inconvenience to other litigants, witnesses, counsel and the court; e) factors related to efficient judicial administration; f) whether there have been other veiled attempts at delaying the trial; g) whether the defendant has other competent counsel retained by him who have acted in a leading role in his defense; h) whether the defendant has counsel retained by him who have the support of skilled associate counsel and paralegals and investigators who are highly knowledgeable about his case; i) whether there will be a Sixth Amendment denial of choice of counsel if the trial proceeds with two chosen retained counsel (Plaisted and Solomon) rather than delaying the requisite time for a third attorney to get "up to speed" to join the defense team and act in a meaningful role in Mr. Curry's defense; j) the complexity of the case; and k) other factors unique to this case.

This Court's Balancing of the Above Factors

1. The Plaisted/Solomon portion of the Defense Team was Privately Retained and Prepared for Trial

By May 15, 2006, Mr. Plaisted had been privately retained counsel paid by Mr. Curry for nearly two years to defend him. Plaisted, a leading defense lawyer from a major firm, was zealously and vociferously defending Mr. Curry as an integral part of the Plaisted/Solomon/Nuzzi defense team. Mr. Plaisted is one of a small group of counsel designated as Certified Criminal Counsel by the New Jersey Supreme Court; such designation has special recognition in the New Jersey bar. During nearly two years of numerous pretrial hearings, exceptionally lengthy sets of motions and briefs and oral arguments on a myriad of complex issues, Mr. Plaisted acted in the leading role of all 14 defense counsel and demonstrated that he intimately knew every detail of this case. Mr. Plaisted together with his associate, Ms. Solomon, and his large firm's paralegals, had spent countless hours reviewing the tapes, the transcripts, and the physical and documentary evidence. It was Mr. Plaisted, Ms. Solomon and their team who scrutinized each and every piece of paper produced by the Government as exhibits in the case and listened to the audibility of each tape, which led Mr. Plaisted and Ms. Solomon to demonstrate an extraordinary command of every facet of this complex case, no matter how nuanced. There had never been any dissatisfaction voiced by Mr. Curry about any of

Mr. Plaisted's work on his behalf, throughout many long court proceedings. Nor was Mr. Curry seeking to replace Mr. Plaisted on the eve of trial. As Curry stated on May 11, 2006, he simply didn't want Plaisted to do "all" of the trial by himself. He expressed no displeasure with the quality of Mr. Plaisted and Ms. Solomon's vigorous defense of him, nor of the strategic choices they had made for nearly two years.[9]

Indeed, it was Mr. Nuzzi who was claiming to be unprepared for trial. The Plaisted/Solomon/Nuzzi team took the extraordinary step of bringing a mandamus petition to obtain delay based on Nuzzi's claimed need for more time to prepare for trial.[10] It was clear to the Court that the Plaisted/Solomon portion of the defense team, whom Curry himself had retained, was well prepared to go to trial and had in fact done all of the things that trial counsel does, such

---

[9] As the trial progressed, this Court's observation of the relationship between Curry and the Plaisted/Solomon team confirmed its earlier view that Curry was not displeased with his representation by Mr. Plaisted and Ms. Solomon, with whom he clearly had a warm, close and pleasantly communicative relationship both in and out of the presence of the jury.

[10] On April 18, 2006, the mandamus petition was filed with the Third Circuit seeking additional time for Mr. Nuzzi to prepare for trial. As this Court learned on May 11, 2006, the Plaisted/Solomon/Nuzzi team knew by April 6, 2006 that Mr. Nuzzi faced a serious conflict of interest that would result in his withdrawal from the case. Yet, the mandamus papers were silent on this issue, while simultaneously pleading for a delay to prepare Nuzzi for trial.

as scrutinizing evidence. He had stated in his mandamus briefs that he and Solomon would be co-trying the case with Nuzzi.

2. Actual length of Delay that Would be Needed for an Additional Counsel to Be Retained and thereafter Prepared For Trial

The request was for an adjournment until September to enable Curry to hire a third attorney to try the case with the Plaisted/Solomon team. While this Court considered the request, its own knowledge of the history of the case led inexorably to the conclusion that a newly retained third counsel would require a far, far longer adjournment than September 2006, to be properly prepared, while the Plaisted/Solomon team was already highly prepared.

First, based on this Courts extensive experience, it would take, at a minimum, 60-90 days to find counsel both (a) willing to take on such a difficult case and (b) able to free up time on his/her own calendar to prepare for and try a projected three-month trial. Second, based on the amount of time that many of the original 14 defense counsel had stated that they needed to review 2,000 taped calls and volumes of evidence, any adjournment would likely extend to between 9-12 months before a new trial date could again be set. The Defendants had already been in custody for over two years since their

arrest in March, 2004, and a trial date in 2007 was inadvisable.

Moreover, any proposed additional counsel's other trial commitments would have had to be taken into consideration, and Mr. Plaisted had already raised concerns about his own calendar and the need to attend to his other legal work. Thus, any adjournment would result in Mr. Plaisted seeking to withdraw from the case. This was not simply conjectural. On April 26, 2006, at the final status conference before the then-scheduled May 3, 2006 trial date, Mr. Plaisted asked the Court in a letter filed that same day for leave to reduce his time commitments on the Curry case in order to work on his civil cases and appeals. This Court was surprised by this unusual request on the eve of trial, and informed Mr. Plaisted that he had been an "integral part of the trial team" who would remain and maintain his substantial co-counsel role in defending Curry. Even without then knowing that ten days later Nuzzi would move to withdraw, the Court said to Mr. Plaisted, "you've been on this trial team for two years . . . and we'd be delighted to have your continued presence here to further give Mr. Curry all possible legal advice he could ever need. . . ." Transcript of April 26, 2006, pp. 47-48. After Nuzzi withdrew, the Court certainly did not want an adjournment that would risk losing the Plaisted/Solomon defense team, who were the two privately retained defense counsel with extensive knowledge of how to defend the case, with whom Curry was clearly satisfied, and clearly

planned to defend Curry at trial.[11] The only issue raised by the last minute request for continuance is what role or function a newly added attorney would have in *addition* to the Plaisted/Solomon team.

This Court's own familiarity with the lengthy history of the case at that time also informed its decision to remain on course with the Plaisted/Solomon defense team. All counsel and the Court had agreed early on that a complex case order must be filed to allow sufficient time for defense counsel to review the complex evidence, including thousands of pages of documents and transcripts and to listen to over 2,000 tape recordings. As various defense counsel had explained to this Court during numerous hearings, motions arguments and status conferences, in order to defend the case it would be necessary to listen and review the transcripts of not only those tapes that the Government planned to use at trial, but also all the other tapes which might add context or be argued by the defense to show a lack of involvement, a lesser role, or separate conspiracy, etc., by Mr. Curry or any co-Defendant. Various other defense counsel in the case, who were also highly experienced members of the defense bar, informed this Court that they could not be prepared in less

[11] In his mandamus petition briefs seeking to delay the trial, Plaisted simultaneously stated that he was fully familiar with the Curry case and expected to serve in a significant role as co-counsel at trial, doing all written work and sharing witness examination duties with Nuzzi.

than 9 months to a year of preparation. Transcript of October 14, 2004, pp. 13-24. Thus, it was reasonable to believe, as this Court did, that any newly retained additional counsel would need far longer than September, 2006 to be prepared for trial and such a lengthy delay would likely cause other disruptions, including difficulties for Mr. Plaisted to continue as trial counsel.

3. Other Continuances Had Repeatedly Been Sought and Granted by This Court.

Cognizant of the competing trial schedules of the 14 trial counsel in this case, this Court spent considerable time asking for defense counsel's other trial obligations and setting fair trial dates. Twelve defendants were arrested on February 27 and March 4, 2004.[12] They were originally charged and presented to different judges. On July 16, 2004, a Superseding Indictment charged them jointly in a conspiracy; that case was assigned to this Court and defendants were arraigned on August 4, 2004. An October 19, 2004 trial date was initially set, and the Court invited counsel to review their calendars and the quantum of time needed to prepare and let the Court know if an adjournment was needed. All counsel agreed that a

[12] Defendant Baskerville fled and was arrested on November 14, 2005, after being featured on America's Most Wanted.

complex case order should be entered, and this Court did so on November 10, 2004. This Court then set a new trial date of May 3, 2005. Certain defense counsel then sought another adjournment to accommodate their schedules; the Court offered them the opportunity to meet and confer and suggest mutually agreed trial dates. Thereafter, Mr. Plaisted wrote and stated that counsel were unable to agree on any date.

This Court on April 28, 2005 granted an adjournment of the trial date to September 20, 2005. At a June 2005 hearing on other matters, a different defense counsel objected to the September 20, 2005 trial date as inconvenient, although none had objected when that date had been set by the Court. The Curry defense team convened a meeting of all defense counsel; all defendants jointly petitioned this Court for one last adjournment of the trial date until May 3, 2006.

Thus, after multiple defense petitions to adjourn multiple trial dates, the May 3, 2006 trial date was finally set at the urging of Curry's defense counsel to accommodate Nuzzi's other trial schedules and permit him to be on the trial team. The court granted Curry's request. The Plaisted/Solomon portion of the Curry defense team zealously led Curry's defense for nearly two years, with voluminous sets of pre-trial

motions, affidavits, and other applications for relief,[13] which clearly showed that they were getting ready for

---

[13] Plaisted and Solomon filed many motions on behalf of their client during the duration of this case, both pre-trial and during trial:

* September 8, 2004 – motion for an order granting pre-trial release and/or setting bail and/or relocating the defendant to a new facility

* September 9, 2004 – motion to sever the Defendant's trial, to dismiss the indictment, to suppress evidence, and for an order requiring (1) pre-trial hearings, (2) discovery, and (3) a bill of particulars

* January 10, 2005 – motion for an order to dismiss the indictment, to suppress all evidence and for a hearing

* January 10, 2005 – motion for reconsideration of the order denying the motion for pre-trial release

* January 10, 2005 – motion to extend the time to file an appeal of the denial of pre-trial release motion

* January 10, 2005 – interlocutory appeal of the denial of the motion for pre-trial release

* May 23, 2005 – motion to have outstanding discovery and suppression issues assigned to a magistrate judge for resolution and/or hearings

* June 21, 2005 – application seeking entry of a proposed order resolving certain discovery issues

* July 13, 2005 – motion to suppress all wiretap and physical evidence and/or dismiss the indictment

* September 8, 2005 – application for hearings on certain issues

* April 4, 2006 – motion to compel the Government to disclose electronic surveillance information and to conduct a hearing to determine whether any such information tainted the evidence upon which the charges are based

* April 4, 2006 – motion to exclude the Government's experts

(Continued on following page)

---

* April 10, 2006 – motion *in limine* to bar all R. 404(b) evidence

* April 10, 2006 – motion *in limine* to preclude expert testimony

* April 10, 2006 – motion *in limine* to bar all evidence not derived independently of the wiretaps

* April 10, 2006 – motion *in limine* to preclude unproduced evidence

* April 10, 2006 – motion *in limine* to preclude all evidence as to violence

* April 12, 2006 – Solomon filed a motion for release of *Brady* materials

* April 19, 2006 – application seeking to bar all 404(b) evidence, a *Daubert* hearing, and to bar all Government exhibits not timely produced

* April 24, 2006 – application joining in Nuzzi's request for adjournment of the trial

* May 14, 2006 – application seeking the Court to order the Government to provide the defense with one composite copy of the tapes the Government intends to introduce

* May 21, 2006 – application seeking a stay of the trial, production of certain evidence from the Government, dismissal of the indictment due to alleged *Brady* violations, and severance; the letter also indicated that the defense believed the Government had misused the grand jury and the defense objected to certain exhibits

* May 23, 2006 – motion to produce discovery and for sanctions and dismissal

* May 29, 2006 – motion seeking dismissal for prosecutorial misconduct, a mistrial or to stay the trial

* June 1, 2006 – application to introduce certain tapes through the Government's witness

* June 4, 2006 – motion for immediate discovery, dismissal, a stay and a limiting instruction

(Continued on following page)

---

* June 7, 2006 – motion *in limine* to preclude certain testimony

* June 7, 2006 – motion *in limine* to preclude records from being admitted

† June 7, 2006 – application seeking to bar the introduction of a statement made by Defendant

* June 9, 2006 – motion for reconsideration of this Court's order on Defendant's motion regarding grand jury abuse

* June 11, 2006 – motion, inter alia, for a stay of the trial and relaxation of the trial schedule

* June 13, 2006 – motion for a mistrial and to reopen cross

* June 14, 2006 – application objecting to expert testimony

* June 14, 2006 – motion for reconsideration of this Court's partial denial of his request to strike certain references in the tapes and transcripts

* June 18, 2006 – motion seeking various forms of relief, including mistrial, a stay and dismissal of certain counts of the Indictment

* June 20, 2006 – motion for disclosure of criminal records

* June 20, 2006 – motion to exclude the testimony of the money laundering expert

* June 23, 2006 – motion to strike

* June 24, 2006 – motion for disclosure of certain criminal records

* June 24, 2006 – motion for disclosure of information re: N-178

* June 25, 2006 – motion to preclude expert testifying as to similar source of drugs

* June 25, 2006 – motion to preclude expert reference to jewelers records

* June 25, 2006 – motion to continue cross-examination of Snowden

* June 25, 2006 – motion to exclude redirect as to shootings

(Continued on following page)

trial. Most other defense counsel simply joined into the Plaisted/Solomon legal work because it was so thorough, detailed and zealous.

In late April 2006, Nuzzi wrote to ask for an adjournment of the May 3, 2006 trial date because his other trial had continued longer than he had anticipated. The trial phase of that trial ended with summations on April 6, 2006.[14] That permitted Nuzzi time to turn his attention back to refreshing his own

---

* July 2, 2006 – motion for relaxation of visitation

* July 2, 2006 – motion for *Brady* and *Giglio* materials regarding Yarborough

* July 2, 2006 – motion to preclude the Government's obstruction of access to witness

* July 4, 2006 – motion to make determination regarding trial subpoenas

* July 5, 2006 – application requesting permission for Nuzzi and others to visit Defendant and to move Defendant

* July 5, 2006 – motion to rule on scope of cross-examination of a witness

* July 5, 2006 – motion for a ruling on certain witnesses

* July 5, 2006 – motion seeking to not sit on Friday

* July 6, 2006 – motion to admit admissions of the Government into evidence

* July 10, 2006 – motion for various relief

* July 11, 2006 – motion to admit certain admissions

* July 11, 2006 – motion to admit certain exhibits

* July 17, 2006 – motion *in limine* to strike a reference from a Government Transcript

[14] Mr. Nuzzi actually completed his summation on April 5, 2006.

work that he had previously done on the Curry case.[15] Notably, Mr. Plaisted and Ms. Solomon had, by their extensive written and oral arguments, demonstrated to the Court that they were highly prepared by late April 2006. Their preparation for trial was reflected by the numerous applications they were filing, i.e., objections to exhibits and *in limine* motions, and statements on the record. However, in order to enable them to have the time to get Mr. Nuzzi back up to speed as a fellow member of the defense team, the Court again granted a final short adjournment of the trial date to May 15, 2006.

Mr. Plaisted and Ms. Solomon were extremely well prepared and had extensive knowledge of the case, and they had divided responsibilities with Mr. Nuzzi with respect to the oral presentation to the jury. After this Court granted Nuzzi's withdrawal motion, the Court wished to give Mr. Plaisted a brief period of time to prepare for the opening statement in the case, in the event that this responsibility had been Nuzzi's.

As he acknowledged in his mandamus brief, Mr. Plaisted certainly expected to do all the motion work at trial, as well as the trial briefing and handling certain witnesses, sharing the witness examination work with Mr. Nuzzi in the orderly way the Court

---

[15] As early as June 15, 2005, Nuzzi had shown that he was familiar with Curry's tapes. See Transcript of June 15, 2005, p. 85.

had earlier required.[16] With Mr. Nuzzi's withdrawal from oral presentation in front of the jury, the Court wished to ensure that Mr Plaisted had the benefit of any insights or strategic ideas for case presentation from Mr. Nuzzi,[17] and sufficient time to rehearse an opening statement as well as prepare cross-examination.[18] For that reason, the Court granted an adjournment until May 22, 2006 for opening statements, required the Government to identify its first witness so that Mr. Plaisted could ready his cross-examination, and confirmed that Mr. Plaisted would not have to begin the first cross-examination until May 30, 2006, a date more than two weeks after Nuzzi's withdrawal. In sum, this Court granted multiple continuances upon request.

---

[16] During one particularly contentious status conference about discovery in this matter, Nuzzi and Plaisted, both highly experience defense counsel in their own right, were each interrupting each other and the Court repeatedly – one rising to argue a point, and then the other rising a short time later to revisit the same point. See Transcript of June 15, 2005, pp. 85-95. At that time, the Court reminded them about the rules when multiple defense counsel represent a single client, i.e., one trial attorney on his feet per witness, to avoid jury confusion.

[17] The Court required Nuzzi to make himself available to Mr. Plaisted to share any insights or strategy that he might have upon request by Mr. Plaisted. Not surprisingly, in light of Mr. Plaisted's preparedness, Mr. Plaisted did not need much, if anything, in terms of strategy or insight from Nuzzi.

[18] Plaisted's opening statement was very well done, and each cross-examination was tenacious and thorough.

4. Balancing the degree of inconvenience to other litigants and witnesses.

This case has presented exceptional difficulties to the law enforcement agencies charged with protection of pretrial detainees and witnesses: the United States Marshal's Service ("USMS") and the Drug Enforcement Administration. ("DEA"). The United States Attorney's Office was granted leave to file an in camera brief in support of its application for late production of *Giglio* material to the defense because of concerns about the safety of witnesses. One of the manner and means of the Curry Organization's drug conspiracy charged in the indictment was the use of extreme violence including murder, to deter its members from cooperating with law enforcement and silence witnesses who were to testify against its leaders. While the Court limited the number and evidence of murders introduced as proofs, the Court was aware, based on highly credible *ex parte*[19] proffers made by the United States Attorney's Office, that several witnesses in various court cases against Curry associates had been murdered. The Curry investigation itself was ended abruptly in March 2004 because the prime witness to a murder committed by Curry's partner was himself murdered. This murder of witness Derrick Berrian on March 1, 2004 was committed after Curry co-conspirators were observed on February 24, 2004 "circling the block" where

[19] While these proffers were *ex parte* when made, they have since been provided to the defense.

Berrian lived; and Curry himself was heard on a wire-tapped conversation dated February 24, 2004, saying in the background "where did Tyheed[20] put his gun." Transcript *of ex parte* proceedings of May 9, 2006, pp. 45-46.

The Court was apprised of concerns about the violence against witnesses based upon various pre-trial events and other events that occurred just as the trial began. Specifically,

* August 18, 2004 – In support of its application requesting to turnover *Giglio* material later, the Government submitted an ex parte brief, filed under seal, which set forth details regarding threats, intimidation and murder of witnesses the Curry organization believed to be cooperating against them.

* March 30, 2005 – Second Superseding Indictment filed alleging violence (threats, intimidation and murder) as part of the manner and means of the conspiracy.

* April 21, 2006 – Government filed Motion seeking to introduce 404(b) evidence and in a footnote referenced the murders of Derrick Berrian and Darnell Anderson.

* April 26, 2006 – Court ordered Government to immediately provide to the defense redacted copies of police reports, autopsy reports and witness statements related to

---

[20] "Tyheed" refers to Tyheed Mitchell, another of Curry's co-conspirators

the Berrian and Anderson murders to facilitate defense preparation.

* April 28, 2006 – Court conducted in camera review of redacted police reports, etc. after defense complained they were too redacted and the Court verified the redactions were in accordance with the Court's order of April 26, 2006.

* May 9, 2006 – Court heard in camera proffer of evidence the Government planned to adduce at trial with respect to certain informants, pursuant to the Court's order of May 3, 2006, in order to determine whether the disclosure of *Jencks* and *Giglio* material during the normal course of trial will result in any delay in the trial.

* May 22, 2006 – *ex parte* proffer by United States Marshals in chambers – jail inmate hired by Curry to kill a cooperating witness.

* May 24, 2006 – *ex parte* proffer by United States Marshals in chambers – Baskerville was overheard by a Passaic County Sheriff's Officer telling Curry that "we have a hit on [witness] Walker and we have the hitman already."

Keeping cooperating witnesses[21] alive and safe was a major concern in light of the modus operandi of

---

[21] The Court learned of these cooperating witnesses pretrial during the *ex parte* disclosures described above.

the Curry Organization to kill witnesses as a means to secure the dismissal of criminal charges.[22]

The cooperating witnesses were in different physical locations, housed by different authorities, some state and some federal. It took extraordinary manpower to protect witnesses in so many different locales in New Jersey, which does not have its own designated federal holding facility for pretrial detainees. The U.S. Marshals in New Jersey must house detainees in state jail, which presents special security concerns.

In the tense events surrounding this case, concerns about witness safety were critical. Events during the first week of trial confirmed this Court's belief that any significant adjournment of the trial would unduly endanger witnesses and prejudice the prosecution's case because the witness identities had been revealed. Among other things, during the first week of the trial, this Court was informed in an *in camera* proffer by the United States Marshals that they had just uncovered a plot by Curry to kill a witness, who was in another New Jersey state jail. Fortunately, the nascent plot was foiled by quick work by law enforcement.

---

[22] A full year earlier, the Court learned that Defendants had already discovered witness Walker's identity as a confidential informant. A defense investigator located Walker, who was housed out of State for his protection. Another cooperating witness would later testify at trial about being hired by Curry to kill Walker.

Early in Lachoy Walker's testimony, the United States Marshals again informed this Court of another threat. This time, the Deputy Marshals reported that a sheriff's officer responsible for the transportation of Curry and Baskerville from the detention facility to court overheard Baskerville reporting to Curry that "we have a hit on Walker and we have the hitman already." The Court found the threat credible, in light of the modus operandi of the Curry Organization and the foiled plan uncovered just two days earlier to kill a different jailed witness believed to be cooperating with the prosecution.

These two events relayed by the United States Marshals are two events that confirm that a concern about witness safety, was very real in this case.

Beyond keeping witnesses alive, the prosecution would also be prejudiced by the dimming of witness' memories if another adjournment were granted. The trial date had already been adjourned repeatedly, and witnesses would need to recall events dating back to 2000, when the charged conspiracy began.

5. Factors Related to Efficient Judicial Administration.

As the United States Court of Appeals for the Third Circuit found proper in *United States v. Kikumura*, 947 F.2d 72, 78-79 (3rd Cir. 1991), this Court balanced factors beyond the contours of this case alone in weighing requests for continuances. Factors of efficient judicial administration and the

effect on other litigants may also be weighed. The Court has thus also weighed the fact that there is a public interest in prompt trials in criminal cases, and that this case had been pending for over two years at the time of the last continuance request. This Court had to be taken off the "wheel" and thus could not be assigned to other criminal cases for months preceding the May 3, 2006 start date because it could not offer other defendants a speedy trial in light of the anticipated three-month duration of this case. This put a burden on other judges and other counsel who sought prompt trial proceedings. This Court's large docket of pending civil cases could not have realistic dates set for court proceedings. An adjournment until September 2006 would render it unfeasible to be put back on the wheel, because this Court would have to be taken off again as soon as the instant trial resumed. Moreover, as stated above, the September date was not realistic because a second trial counsel would need far more time than that to prepare.

6. Whether There have been Veiled Attempts to Delay the Trial or Efforts to Manipulate the Trial Proceedings

This factor is perhaps the most difficult to state because this Court does not wish to impugn the motives of counsel. Thus, this factor is noted but is not weighed heavily in ruling upon the continuance request. Certain of the last-minute events certainly appear to have been designed to disrupt the orderly trial process. Nuzzi's non-disclosure of his unwaivable

conflict of interest was apparently being used to seek suppression of tapes and drugs that were admissible evidence against Curry, when there was no motion to suppress them nor legal ground to suppress.[23] Curry clearly understood the strategy to use the conflict of interest to get suppression of otherwise proper evidence.[24] Nuzzi also did not inform the Court of his

---

[23] It was clear from reading Nuzzi's May 9 letter, and listening to his testimony on May 11, 2006, that he sought to use his conflict of interest to force the Government not to use highly relevant evidence that was damaging to Curry.

[24] Nuzzi testified on May 11, 2006 that Curry's "focus was on whether or not the legal ruling Your Honor was going to make as to the admission of those tapes. . . ." Transcript of May 11, 2006, p. 32. This testimony confirmed that Curry knew and understood the defense strategy. Curry and Nuzzi hoped to use Nuzzi's conflict of interest as a means of suppressing evidence.

Nuzzi also testified that his dual representation conflict would pose a major problem if the prosecution used evidence of the largest drug and money seizure that occurred in the case. Nuzzi had not gotten a waiver from former client Webb, who was arested with Curry's co-conspirators (the Hannibal brothers) on December 23, 2003. (Webb was charged only with state offenses). Nuzzi testified: " . . . whoever represents Mr Curry can't call the Hannibal brothers, ... we can't call the Hannibal brothers based on their plea allocutions [which inculpated Curry]." Transcript of May 11, 2006, pp. 23-24. "If I did not call – if I was not Mr. Webb's attorney and the Government was going to proceed on the circumstance surrounding what happened . . . on December 23rd, 2003 [the date of the drug seizure], and if I couldn't call either of the Hannibal brothers of course I would like to call Mr. Webb." Transcript of May 11, 2006, pp. 25-26. Nuzzi also testified that he possessed attorney-client information from Webb that he would expose in cross-examination or refrain from using on behalf of Curry if Webb were called as a defense witness. Transcript of May 11, 2006, p. 24. With Plaisted

(Continued on following page)

"defense witness" conflict until after the U.S. Attorney's Office wrote its letter about his dual representation conflict. As this Court stated on May 11, 2006, if the Government had not taken the step of informing the Court about Nuzzi's conflict of interest, a mistrial would have occurred when Nuzzi took the witness stand, as in fact he did on July 7, 2006. Finally, the last minute disruption of this case gave the defense the delay that had been sought unsuccessfully via mandamus petition to the Third Circuit.

7. Whether There will be a Sixth Amendment Denial of Choice of Counsel if the Trial Proceeds with Curry's Chosen Counsel of Plaisted and Solomon

Curry privately retained Mr. Plasited and Ms. Solomon for his trial team, just as he also retained Nuzzi. The Plaisted/Solomon portion of the Curry defense team was highly experienced, zealous, and had examined every aspect of the case for nearly two years. Plaisted's firm employed the paralegals and other support staff who worked on the defense. Curry never expressed displeasure with the quality of Plaisted's or Solomon's work on his behalf. Nuzzi was not disqualified by the Government or by the Court;

---

as sole defense counsel, Webb could be called as a witness for the defense if he had anything helpful to say.

rather he brought his own motion to withdraw because he planned to be a defense witness.[25]

As states above, Curry then sought to add another privately retained lawyer to work with Plaisted and Solomon. The Court has endeavored from the outset to make sure that Curry had the services of retained counsel of his choice, granting multiple adjourned trial dates to accommodate Curry. After Nuzzi's motion to withdraw was granted, Curry continued to have two counsel of his choice but wanted a continuance to retain yet another so that his counsel team of choice could divide up the work exactly as Curry wished.

___ By May 15, 2006, the Court had observed the interaction of Curry with each member of the Plaisted/Solomon/Nuzzi team. Most often, his interaction was with Plaisted, who had dominated the defense presence in court for two years. Plaisted did virtually all of the courtroom work as well as briefs. Plaisted acted in a leading role for both Curry and the entire group of defense counsel during all pretrial proceedings. Solomon acted as a most thorough, devoted and close confidant of Curry, maintaining close communications by leaning over to speak with him, often touching his arm.

---

[25] Nuzzi did testify as a defense witness. Other defense counsel were also subpoenaed for Curry's defense, to rebut the proofs that Curry controlled his gang by, *inter alia*, controlling and paying counsel through middlemen.

From the earliest stages in the case, Plaisted was clearly acting in a lead role as Curry's chosen counsel. He entered his appearance at the arraignment as follows: "Your Honor, Jim Plaisted, Chris Adams from my firm, and Vincent Nuzzi and Lin Solomon, all for Mr. Curry. . . ." Plaisted informed the Court that he had filed motion papers in which all the other Defendants had joined.

Most significantly, this Court had been told that Curry had confidence in *both* Plaisted and Nuzzi to represent him, *either together or each acting separately*. At a November 1, 2004 hearing, the Court asked about trial dates. Mr. Plaisted responded on behalf of himself and Mr. Nuzzi, stating that they both wanted an early trial date, had exchanged their respective calendars and that "between Mr. Nuzzi and I, will be available together for most of that time period, and that we will work out so that he's represented, and stated that they had spoken to Curry "about all of those kinds of issues. . . ."

At that same hearing, Nuzzi stated to the Court during the colloquy about trial schedules: "First of all, just to digress for a moment, you did ask me last Thursday to confer with Mr. Curry, because I raised the point about my particular trial schedule, and I think this Court should be absolutely clear on this, and Mr. Curry and I spoke late into the night on Friday evening. He *wants a trial date even if that would mean that I cannot participate*. . . ." When this Court said to Mr. Nuzzi, that " . . . it seemed to me that you yourself were already committed to various

clients that would take you for a big chunk of 2005," Nuzzi responded:

> But I just wanted this court to understand, mindful of Your Honor's request, I did speak with Mr. Curry at length. *He is confident in the competency of the Walder Hayden trial team* [of Plaisted and Solomon] ... as reluctant as I would be to not participate, *he wants a trial date, and understands that I might not be able to participate if things go according to my schedule. I want to be absolutely clear.*[26]

Thus, while Mr. Curry desired to have Mr. Nuzzi present at his trial, he had confidence in the Plaisted/Solomon team from the Walder Hayden firm and was willing to go to trial with them as counsel in Mr. Nuzzi's absence. This Court was thus mindful of Curry's confidence in Mr. Plaisted to defend him without Mr. Nuzzi's participation.

Mr. Curry never voiced dissatisfaction with either the quality of the work or his ability to communicate with Mr. Plaisted and Ms. Solomon, whom he had privately retained and paid as his chosen counsel for two years of constant work. On May 15, 2006, the Court engaged again in a colloquy with Mr. Plaisted about Curry's request for another continuance, and Mr. Plaisted said for the first time

---

[26] At that time, counsel sought a September 2005 trial date, which the Court granted. That date was later adjourned to May 3, 2006 again at the specific request of Curry's counsel.

only that Curry was "a little hesitant" about communicating with Mr. Plaisted because he had formerly been an Assistant United States Attorney ("AUSA"). The Court confirmed that he had last been an AUSA over 20 years earlier, and had been a defense lawyer for the past two decades. Transcript of May 15, 2006, p. A.11; see also Transcript of May 11, 2006, p. 54. The Court also knew that Mr. Nuzzi had also formerly been the First Assistant Essex County Prosecutor, and that Curry had no problems with that. Moreover, this Court had seen open, pleasant and continuous communication between Curry and the Plaisted/Solomon team for nearly 2 years. This Court's confidence in Curry's good communications with and confidence in Mr. Plaisted and Ms. Solomon was confirmed as this Court observed them at trial in regular, free-flowing, harmonious communication, whether the jury was present or not. Transcript of July 12, 2006, pp. 31-32. On days when Mr. Plaisted had been vigorously cross-examining a particular prosecution witness, as Curry was leaving the courtroom with his United States Marshal escort, the Court saw him smiling and commenting on how great a job Mr. Plaisted was doing. Curry is, and has always been, zealously represented by counsel of his choice privately retained by him.

CONCLUSION

This Court is ever mindful of Mr. Curry's right to retain his choice of counsel.[21] Mr. Curry is represented by a highly zealous, skilled and hard-working team of defense counsel and paralegals privately retained by him years before the trial, in whom he has expressed confidence to try the case in Mr. Nuzzi's absence. Balancing the factors set forth above, in light of this Court's awareness of Mr. Plaisted's deep knowledge of every nuance of this case, the Court knew that a further continuance of the May 15, 2006 trial date to seek a third lawyer to add to the team would in reality mean a nine month to one year continuance, would make it difficult or impossible for Mr. Plaisted to remain defense counsel, would pose prejudice to the Government's witnesses, and would not be in the interest of efficient judicial administration. Mr. Curry had already indicated to the Court that he was confident in being represented at trial by Plaisted's firm alone. Thus, for all of the above reasons, this Court granted a limited continuance from May 15, 2006 to May 22, 2006, to better enable Mr. Plaisted and Ms. Solomon to fully prepare for trial opening statements.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.

---

[21] *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	Criminal No. 04-280
v.	Hon. Faith S. Hochberg, U.S.D.J.
HAKEEM CURRY, et al.,	**OPINION and ORDER**
Defendants.	May 19, 2006

This matter comes before the Court on the timely[1] *in limine* motions filed by the United States and Defendants, Hakeem Curry and Rakim Baskerville. The United States has filed *in limine* motions seeking use of evidence prior to the date of the conspiracy as background for the conspiracy and to admit certain 404(b) evidence. Defendant Curry has filed the following *in limine* motions:[2] (1) to bar all 404(b) evidence, (2) to preclude experts; (3) to preclude unproduced evidence; (4) to preclude evidence as to violence; (5) renewed request for release of a 1999 videotape. The Court has reviewed the briefs of the parties, heard oral argument and received additional submissions of Third Circuit caselaw from the Defendants.

---

[1] The Court finds that the Government's submissions were timely.

[2] Defendant Baskerville has joined in all of Defendant Curry's *in limine* motions.

The Government seeks to introduce certain evidence of prior convictions and bad acts of Defendants in its case-in-chief in accordance with Rule 404(b), and Defendants seek to bar this evidence. The Government proffers this evidence as proof of motive, intent, opportunity, plan, preparation, knowledge, identity, and absence of mistake or accident. Before evidence can be admitted pursuant to Rule 404(b) the following four requirements must be met: (1) evidence must have a proper purpose under Rule 404(b); (2) it must be relevant under Rule 402; (3) its prejudicial effect must not "substantially outweigh" its probative value under R. 403; and (4) the court must instruct the jury to consider the evidence *only* for the limited purpose for which it is admitted, see *Huddleston v. United States*, 485 U.S. 681, 691 (1988); *United States v. Cross*, 308 F.3d 308 (3d Cir. 2002).

In the instant case, Defendants are charged in a large conspiracy with possession with the intent to distribute heroin and cocaine, in which violent acts are used as a manner and means of controlling the conspiracy and ensuring that no persons are Government informants. Defendants' prior convictions are for drug-related offenses. The Court thus considers whether the convictions are probative of Defendants' intent, knowledge, and absence of mistake or accident. *See United States v. Vega*, 285 F.3d 256, 263 (3d Cir. 2002) (evidence of a defendant's participation in a prior drug conspiracy is probative of his knowledge and participation in a later drug conspiracy); *United States v. Givan*, 320 F.3d, 452, 461-62

(3d Cir. 2003) (evidence of prior narcotics offense is properly admitted under 404(b) to prove knowledge and intent, as well as to rebut a claim of ignorance).

The Government must prove Defendants' intent to participate in a narcotics distribution conspiracy where intent, knowledge and plan must be inferred from tape recorded conversations containing code intended to appear to be clothing-store related, and Defendants are likely to claim ignorance of the contents of packages and meanings of phone calls, *see Vega,* 285 F.3d at 263 (finding that the 404(b) evidence was of "critical importance" where defendant denied knowledge of the narcotics conspiracy and alleged that he met the co-conspirator solely for the purpose of providing plumbing services).[3] The proffered evidence of Defendants' prior convictions is relevant to a proper 404(b) purpose, and its prejudicial effect does not substantially outweigh its probative value. *See United States v. Bradley,* 173 F.3d 225, 230 (3d Cir. 1999). The proper 404(b) purpose of the evidence to prove material elements of the crimes charged is significant in this case and not

---

[3] Evidence in this case will also come from co-conspirators. The defense is likely to attack this evidence as inherently unreliable, arguing that the co-conspirators have a motive to testify falsely against Defendants in an attempt to obtain a reduced sentence. In this case, evidence of Defendants' prior drug trafficking convictions, and background evidence of the prior association of the Defendants with other co-conspirators, is proof of Defendants' intent, knowledge and plan to commit the crimes alleged here.

cumulative. Moreover, while proof of prior convictions always has some prejudice associated with it, such prejudice does not substantially outweigh the probative value and proper purpose of the evidence to prove Defendants' knowledge and to rebut any claims of ignorance of the acts of co-conspirators and contents of packages and phone calls.[4] See *United States v. Boone,* 279 F.3d 163, 187 (3d Cir.), *cert. denied,* 535 U.S. 1089 (2002) ("the evidence demonstrates his 'knowledge,' 'intent,' and 'lack of mistake or accident' [and will therefore be admitted] . . . to rebut his defense of ignorance"). When the jury will be hearing a very large quantum of evidence from co-conspirators and wiretapped calls over a trial projected to last 8-10 weeks, the vast majority of which evidence will relate directly to the drug conspiracy and money laundering charges in the Indictment, the use of this limited 404(b) evidence will not cause fact finders to unduly focus on such evidence, particularly when they will have been cautioned about using it *only* for a proper purpose and that they may *not* use it as

---

[4] Defendant Curry maintained that he ran a clothing store and it is probable that he will employ a similar defense. See *United States v. Zolicoffer,* 869 F.2d 771, 773 (3d Cir.), *cert. denied,* 490 U.S. 1113 (1989) (holding that district court's admission of prior cocaine deals was more probative than prejudicial because "[t]he evidence permitted the jury to infer that [the defendant] had access to drugs, especially cocaine, and that he was willing and hoping to engage in large scale drug transactions [especially] [i]n light of [the] defense that [defendant] was engaged in a seafood distribution business rather than a drug distribution business").

evidence of propensity, and such limiting instruction will be drafted in advance by defense counsel with due consultation with the Assistant United States Attorneys. Defense counsel is instructed to inform the Court whenever he believes that such limiting instruction should be given to the jury. The Court will vigilantly instruct the jury not to use evidence of prior convictions for improper purposes such as propensity.[5] See *Huddleston,* 485 U.S. at 691-692; *United States v. Scarfo,* 850 F.2d 1015, 1019 (3d Cir.), *cert. denied,* 488 U.S. 910 (1988); *Givan,* 320 F.3d 452, 264.

The Government also seeks to admit evidence of actions of the alleged co-conspirators with each other prior to the starting date of the conspiracy alleged in the Indictment to show the background of the conspiracy, such as how the conspiracy was formed, how it grew, and that the Defendants together with the co-conspirators heard on tape and the cooperating witnesses have known each other from prior collaborative drug activities and intended to enter into a conspiracy with each other. Thus, evidence that Curry was selling cocaine with others in 1996; that by late 1997, he had established himself as a leading drug supplier and was making large sums of money that

---

[5] This case also has money laundering charges. The Court will similarly limit the Government's use of evidence of non-filing of tax returns via a limiting instruction that no tax offenses are charged and that such evidence may only be considered for proper purposes under 404(b) such as negating a lawful source of funds to buy expensive cars, for example.

he was spending on clothing, cars and other high-end items; that by 1998, he was selling and supplying both cocaine and heroin, depending on what was available; that when members of the Curry distribution organization were arrested, Curry would put up money for bail through an intermediary are relevant to show knowledge, intent, plan and preparation for the instant conspiracy. Acts from before the date of the conspiracy, including use of firearms, meeting locations, and the use of stash houses to store money, guns and drugs are further relevant to prove that Curry's purchase during the time period of the alleged conspiracy of a new Mercedes valued at $115,000 was from drug proceeds.

The Government proffers this evidence for a proper purpose under Rule 404(b) as proof of intent, opportunity, plan, preparation, knowledge, identity, and absence of mistake or accident. This background evidence is relevant under Rule 402, and, after carefully weighing the probative value of this background evidence against the danger of unfair prejudice to Defendants, the Court finds that the evidence is not being offered to prove a propensity to commit illegal acts or that the Defendants have a bad character. Rather, this evidence is directly relevant and probative to show how the conspiracy was formed, the relationship between the co-conspirators, the roles of the co-conspirators in the conspiracy, and the relationship and roles of certain witnesses to the conspiracy, all bearing on the knowledge and credibility of witnesses. "In a conspiracy prosecution, the

Government is usually allowed considerable leeway in offering evidence of other offenses 'to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants in the crime developed.'" *United States v. Mathis,* 216 F.3d 18, 26 (D.C. Cir. 2000) (citing *United States v. Williams,* 205 F.3d 23, 33-34 (2d Cir. 2000)). Evidence of a Defendant's uncharged crimes, committed with a co-conspirator who also participated in the charged offense, and who later testifies against the Defendant at trial may be admitted under Rule 404(b) to illustrate the full contours of the relationship between the Defendant and the cooperating witness, and to rebut defense attacks on the witness's credibility. See *United States v. Cross,* 308 F.3d 308 (3d Cir. 2002); *United States v. Mathis,* 216 F.3d 18, 26 (D.C. Cir. 2000); *United States v. Saada,* 212 F.3d 210, 223-224 (3d Cir. 2000), *Scarfo,* 850 F.2d at 1020; *United States v. O'Leary,* 739 F.2d 135, 136 (3d Cir. 1984); *United States v. Brown,* 679 F.2d 1042, 1049 (3d Cir. 1982). The probative value of the proffered evidence is not outweighed by prejudice to Defendants. The parties shall jointly draft limiting instructions for the jury that the background of the conspiracy is being introduced for a limited purpose.

Defendant Curry seeks a *Daubert* hearing as to two of the Government's experts, a "drug code" person of specialized knowledge and a money laundering expert. The Government has complied with the notice

requirements of the Federal Rules of Evidence in advising the defense that its original expert, Agent Beckett, has, due to passage of time since this case was originally scheduled for trial, been transferred out of the country for three years. He has therefore been replaced with Investigator Holloway, whose testimony will be substantially the same as that summarized in Agent Beckett's report. Investigator Holloway will testify to coded language used by co-conspirators on the intercepted telephone calls. The defense argues that this expert is "not a linguist and has no specific qualifications to permit him to opine on the English language." The Court has considered the *Daubert* factors on the papers and in oral argument and finds that an evidentiary hearing is not required as to the "drug code" witness. It is well-established in this Circuit that experienced government agents may testify as to the meaning of coded drug language, *see United States v. Gibbs*, 190 F.3d 188 (3d Cir. 1999) and *United States v. Berry*, 132 Fed. Appx. 957 (3d Cir. 2005). The proposed 702 witness is qualified to testify competently and has specialized knowledge and expertise in the area of interpreting the use of drug code in calls between alleged drug dealing co-conspirators, and such testimony will assist the trier of fact through such specialized expertise to understand facts at issue in this case. The Court will hold a 104 hearing outside the presence of the jury to further consider the *Daubert* factors relative to the Government's expert who will testify about money-laundering operations of a drug organization, to determine if the proffered

testimony meets the standards enunciated in cases such as *United States v. Majors*, 196 F.3d 1206 (11th Cir. 1999); *United States v. Barker*, 553 F.2d 1013, 1024 (6th Cir. 1977).

Defendant's motion to preclude unproduced evidence is denied. There is no basis for finding a Rule 16 violation under the facts of discovery production in this case, with its very real security concerns.

Defendant's motion to preclude evidence as to violence is denied because the reliance on a statement of AUSA Gay in a prior proceeding that Mr. Curry had not participated in an act of violence was taken out of context and refers to an entirely different shooting that will not be attributed to Defendant Curry. The Defendants have had ample notice that evidence of their participation in violent acts, including murder, would be introduced into evidence as charged in the Second Superseding Indictment filed on March 30, 2005, more than a year ago; the identity of the murder victims is not a surprise; the Court has previously ordered production of autopsy and police reports, etc., including materials that would be *Jencks* material that is ordinarily not required to be produced until the witness testifies at trial. The early production was ordered to avoid delay at trial.

Defendant's renewed motion for release of the 1999 videotape, now claimed as *Brady* material, is

again denied. This tape has been reviewed *in camera*.[6] It does not even remotely constitute exculpatory material. If the Court had determined there to be any exculpatory material in the 1999 videotape, it would have ordered it to be turned over long ago. Nor is the actual videotape required for impeachment purposes. If such tape should become relevant (which it is not now) there shall be a stipulation as to its contents. Finally, the Court addressed the issue of the 1999 videotape in its March 14, 2006 omnibus ruling. Nothing stated by the Government in its *in limine* motion regarding the introduction of evidence dating back to 1996 as background to the conspiracy changes this Court's ruling. Nothing in the 1999 tape goes to the relationship of the co-conspirators, the formation of the conspiracy, motive, means, opportunity or intent nor does it show anything but the identity of the confidential informant. Weighing the lack of relevance of this tape against the security of potential witnesses remains the same; security concerns

---

[6] This tape has been viewed to ensure that it does not constitute *Brady* material and its use as *Giglio* would solely be if Officer Snowden would take the stand if he were to testify about the paragraph in his affidavit regarding Defendant Curry. Ordinarily, such a tape would be turned over as it is of no substantive value to either side. However, in this case, the entire tape constitutes a view of a confidential informant. As such, given the dangers in this case, where perceived informants have been killed, and weighing the danger of releasing the tape against the insignificant value of the tape to the defense, *Roviaro* balancing precludes release.

continue to outweigh lack of relevance. *See Roviaro v. United States*, 353 U.S. 53 (1957).[7]

IT IS on this 19th day of May, 2006,

SO ORDERED that the trial shall proceed in a manner consistent with this Opinion.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.

---

[7] In *Roviaro*, the United States Supreme Court set forth the standard for determining whether the identity of a confidential informant's identity should be revealed. The Court held that "[w]here disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [government's] privilege [to withhold disclosure of the informant's identity] must give way." *Id.* at 60-61. The Court emphasized, however, that protecting an informant's identity serves important law enforcement objectives, most significantly, the public interest in encouraging persons to supply the government with information concerning crimes. *Id.* at 59. The Court left appreciable leeway for trial courts to determine on a case-by-case basis, once a defendant sets forth a specific need for disclosure, whether disclosure is required by weighing the public's interest in protecting the flow of information against the Defendant's right to prepare his defense. *Id.* The Court finds that there is no specific need for disclosure.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1411

UNITED STATES OF AMERICA

v.

RAKIM BASKERVILLE,

Appellant

(D.C. Criminal No. 2-04-cr-00280-11)

No. 07-1467

UNITED STATES OF AMERICA

v.

HAKEEM CURRY
a/k/a IBN a/k/a E.T. HAK a/k/a
MR. EDDIE a/k/a DOUGH BOY
a/k/a MT. GORE

Hakeem Curry,

Appellant

(D.C. Criminal No. 2-04-cr-00280-002)

On Appeal from the United States District
Court for the District of New Jersey
District Judge: Honorable Faith S. Hochberg

Present: SCIRICA, *Chief Judge,* SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and ROTH, **Circuit Judges*

SUR PETITIONS FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

(Filed Apr. 1, 2010)

The petition for rehearing and supplemental petition for rehearing filed by Appellant Rakim Baskerville, and the petition for rehearing of Appellant Hakeem Curry, having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the said Petitions for Rehearing are hereby DENIED.

---

* The vote of the Honorable Jane R. Roth, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

BY THE COURT:

/s/ *Marjorie O. Rendel*
Circuit Judge

Dated: 1 April 2010